Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DIKAR, S. COOP. LTDA.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY
(MATTHEW HAYMAKER, REAL PARTY IN INTEREST),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

*V. THOMAS FRYMAN, JR.
MARK T. HAYDEN
JOHN K. BUSH
THOMAS H. STEWART
GREENEBAUM DOLL & MCDONALD PLLC
1400 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507
(606) 231-8500

Attorneys for Petitioner
**Counsel of Record*

PRESS OF BYRON S. ADAMS ♦ WASHINGTON, D.C. ♦ 1-800-347-8208

QUESTION PRESENTED

Whether a defendant, which is a legal entity of a foreign country and has moved to dismiss the action for lack of personal jurisdiction, may be required consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments and principles of international comity to participate in discovery of non-jurisdictional facts under the Federal Rules of Civil Procedure prior to any ruling by the district court that it has personal jurisdiction over the defendant.

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

In addition to the parties contained in the caption of the case, the following are parties to the proceeding in the district court: Connecticut Valley Arms; Wal-Mart Stores, Inc.; and Gene Sears Supply Co.

PARENT AND SUBSIDIARY COMPANIES

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent company or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Defendant Dikar, S. Coop. LTDA ("Dikar") respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit denied Dikar's motion for a writ of mandamus directed to the United States District Court for the Eastern District of Kentucky.

Dikar, a Spanish cooperative, moved to dismiss this product liability action pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure on the ground that the district court lacks personal jurisdiction. The district court deferred ruling on Dikar's jurisdictional defense until the conclusion of all discovery.

The decision below, which leaves undisturbed the district court's orders requiring Dikar to participate in discovery of non-jurisdictional facts prior to the district court's determination of personal jurisdiction, is inconsistent with the reasoning of *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), and *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), and is in conflict with the decisions of other appellate courts. The Court should grant certiorari to resolve this conflict and make clear that the Due Process Clauses and the principles of international comity preclude the district court from ordering non-jurisdictional discovery until it has made a finding of personal jurisdiction over Dikar.

ORDERS BELOW

The order of the court of appeals, which is unreported, is reprinted at App. 1a-2a. The court of appeals' denial of the petition for rehearing and suggestion for rehearing en banc is also unreported and is reprinted at App. 18a-19a. The relevant orders of the district court, all of which are unreported, are reprinted at App. 3a-17a.

JURISDICTION

The court of appeals issued its order denying Dikar's petition for a writ of mandamus on February 11, 1998. On April 23, 1998, the court of appeals denied Dikar's petition for rehearing and suggestion for rehearing en banc. This petition is being submitted within the time permitted by the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND TREATY INVOLVED

This case involves the Due Process Clauses of the Fifth and Fourteenth Amendments, which are set out verbatim at App. 19a, and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, Mar. 18, 1970, 23 UST 2555, TIAS No. 7444, which is set out verbatim at App. 20a-39a.

STATEMENT OF THE CASE

A. Statement of the Facts

1. Basis for Subject-Matter Jurisdiction of the District Court

Plaintiff, Matthew Haymaker ("Haymaker"), commenced this action in the Circuit Court of Scott County, Kentucky against defendants Connecticut Valley Arms ("CVA") and Wal-Mart Stores, Inc. ("Wal-Mart"). CVA and Wal-Mart removed the action to the United States District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. § 1441(a), based on diversity jurisdiction under 28 U.S.C. § 1332. Haymaker subsequently filed an amended complaint, adding Dikar and Gene Sears Supply Co. as defendants. The district court continues to have subject-matter jurisdiction pursuant to 28 U.S.C. § 1332.

2. Dikar's Motion To Dismiss

The amended complaint states that Dikar "is a foreign corporation whose home office address" is in Bergara, Spain, App. 41a, and alleges that Haymaker was injured while using a rifle designed and manufactured by Dikar, App. 41a-42a. Haymaker, however, does not allege that Dikar has engaged in any activity having any contact in the forum state.

On July 30, 1997, Dikar moved to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(2) on the ground that the district court lacks personal jurisdiction over Dikar. *See* App. 47a-48a. In support of its

motion to dismiss, Dikar submitted an affidavit of its General Director, Jon Muniategui. *See* App. 49a-53a. As stated in that affidavit, Dikar has never sold, advertised, marketed or promoted any of its products in Kentucky or otherwise had any contact with the Commonwealth during Dikar's entire existence. *See* App. 50a, at ¶ 5; App. 52a, at ¶13. Prior to this lawsuit, no Dikar employee had ever visited Kentucky or otherwise communicated with anyone there. App. 50a, at ¶ 4. Dikar has never maintained any office, factory or other place of business in Kentucky, nor has it ever had any property in the Commonwealth or any parent, subsidiary or affiliate incorporated or doing business there. App. 50a, at ¶ 5. Furthermore, Dikar does not have any regular channel (by telephone, mail, facsimile or otherwise) to answer consumer questions or to provide advice, instructions or other information to customers in Kentucky. *Id.*

The affidavit submitted in support of Dikar's motion also established that Dikar is a Spanish cooperative organized and existing under the laws of Spain which is wholly owned by its approximately sixty employees. App. 49a, at ¶¶ 1, 3. The cooperative operates a factory in rural Spain that produces sporting guns, but it does not employ any sales staff for its guns, nor does it engage in any direct distribution or retail sales of these products in the United States. App. 50a, at ¶¶ 6-7. Dikar only manufactures guns which it sells at the wholesale level to independent companies and other entities. App. 50a, at ¶ 6.

Haymaker's amended complaint also named as a defendant Connecticut Valley Arms ("CVA"), a company based in Norcross, Georgia. App. 40a. As stated in the affidavit submitted in support of Dikar's motion, Dikar sold sporting guns to CVA with CVA assuming possession and title of the

guns in Spain at the time of the sale and bearing all subsequent transportation costs and risk of loss. App. 51a, at ¶9. The sporting gun that Haymaker allegedly purchased, as well as the accompanying materials and packaging, all bore the name of CVA as manufacturer, per CVA's request, and Dikar's name did not appear anywhere on the gun or other items that went with it to the customer. App. 51a, at ¶ 8. The affidavit submitted in support of Dikar's motion continued that CVA has no common ownership or affiliation with Dikar and has no business relationship with Dikar other than as purchaser of guns manufactured by Dikar; that all of Dikar's sales to CVA have been solicited and initiated by CVA; that CVA has complete discretion to sell Dikar's guns anywhere in the United States and Canada; and that Dikar after delivering possession to CVA in Spain did not have any involvement in any subsequent sale of the rifle ultimately purchased by Haymaker. App. 51a-52a, at ¶¶ 10-11.

Haymaker served his response to Dikar's motion together with a motion for leave to take additional discovery on August 15, 1997. App. 75a-87a. Haymaker asserted that Dikar's motion was "premature" because Haymaker "has had no opportunity to conduct discovery concerning the jurisdictional issues, from Dikar or other defendants with knowledge." App. 76a.

On August 19, 1997, the district court signed and filed an order which stated:

> The Defendant Dikar, S. Coop. LTDA having moved to dismiss the Complaint against it, on the ground of lack of personal jurisdiction, the Plaintiff having responded, and the Court being sufficiently advised.

> IT IS HEREBY ORDERED that the motion to dismiss is DENIED.
>
> IT IS FURTHER ORDERED that the Plaintiff's motion for leave to conduct additional discovery is GRANTED. Following the completion of all discovery, the Defendant Dikar may renew any dispositive motion concerning jurisdictional issues.

App. 5a-6a.

The district court's order filed August 19, 1997, was the proposed order tendered by Haymaker's counsel at the time he filed his response on August 15, 1997, to Dikar's motion to dismiss. While Haymaker's response had asked for an opportunity to conduct discovery as it relates to the jurisdictional issue before the district court ruled on Dikar's motion to dismiss, the proposed order submitted by Haymaker's counsel which the district court signed without any change, however, provided that Dikar might renew any dispositive motion concerning jurisdictional issues following the completion of "all discovery".

The August 19, 1997, order of the district court, by stating that Dikar's motion to dismiss is "denied" and that Dikar may "renew" any dispositive motion concerning jurisdictional issues following the completion of all discovery, deferred any substantive decision about personal jurisdiction until a later time. In response to Dikar's motion, Haymaker had stated that the Court "should grant Plaintiff's motion for additional discovery and permit the discovery to proceed before [Dikar's motion] is considered." App. 86a. Haymaker added that "Dikar may

wish to renew its motion on jurisdictional grounds at the completion of the discovery." App. 86a. The order submitted by Haymaker which the district court signed without change implements that request: discovery is allowed to proceed before Dikar's motion is "considered" and Dikar is specifically told that it may "renew" its jurisdictional motion at a later time.[1] Thus, as the court of appeals implicitly recognized, the district court has not made any finding that personal jurisdiction exists before ordering non-jurisdictional discovery to proceed.

Dikar moved for a modification of the district court's order of August 19, 1997, to provide that the scope of any discovery as it pertained to Dikar should be limited to jurisdictional facts until the personal jurisdiction question is resolved. The district court denied Dikar's motion for a modification by an order filed September 22, 1997, *see* App. 7a-8a, and by a second order filed October 8, 1997, *see* App. 9a-10a. In the latter order, the district court denied Dikar's motion to certify for appellate review pursuant to 28 U.S.C. § 1292(b) the issue of whether a legal entity from a foreign country that has filed a motion

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[1]The timing of the district court's order also makes clear that it was not any substantive ruling on Dikar's motion. The order was filed on August 19, 1997, prior to the expiration of the time for Dikar to file a reply memorandum supporting its motion to dismiss, and the local rules of the United States District Court for the Eastern District of Kentucky provide that a motion shall not be submitted to the court for decision until after the reply memorandum is filed or the time for filing such a memorandum has expired. Rule 6(b)(1)(B) and Rule 6(e) of the Joint Local Rules for the United States District Courts of the Eastern and Western Districts of Kentucky effective July 1, 1987; Rule 7.1(c)(2) and Rule 7.1(g) of the Joint Local Rules of Civil Practice for the United States District Courts for the Eastern District of Kentucky and the Western District of Kentucky effective August 1, 1997.

to dismiss for lack of personal jurisdiction can be required consistent with due process to participate in unlimited discovery and the Rule 26 disclosure process prior to a determination by the district court that it has personal jurisdiction over that entity.

3. Haymaker's Motion To Compel And Motion To Conduct Depositions Pursuant To The Federal Rules Of Civil Procedure.

On September 4, 1997, Haymaker served Dikar with interrogatories and requests for production of documents, and Dikar served and filed its responses and objections on November 7, 1997. A number of Haymaker's discovery requests called for information that did not have any bearing on whether the district court has personal jurisdiction over Dikar, and Dikar objected to such discovery requests on that ground, among others.

Specifically, Dikar stated:

> Until the Court holds that it has personal jurisdiction over Dikar, any and all discovery relating to non-jurisdictional issues can proceed only pursuant to the procedures established for the taking of evidence in Spain under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

App. 89a, 101a. Spain is a signatory to the Hague Evidence Convention.

On November 21, 1997, Haymaker filed a motion to compel and a motion for sanctions asking that the district court overrule Dikar's jurisdictional objections to the

discovery requests. On the same day, Haymaker filed a second motion for an order directing that depositions of Dikar representatives be taken in Spain in accordance with the procedures set forth in the Federal Rules of Civil Procedure. Haymaker then served a notice to take videotaped depositions of three Dikar employees and two non-party witnesses in Spain "IN CONFORMITY WITH AND PURSUANT TO ANY AND ALL PURPOSES PROVIDED BY THE FEDERAL RULES OF CIVIL PROCEDURE (unless the Court should otherwise rule)." App. 117a. Dikar opposed Haymaker's motions.

On December 17, 1997, the district court filed the following order:

> The Court, being otherwise fully and sufficiently advised, hereby ORDERS THAT:
>
> 1) the motion of the plaintiff to conduct the depositions of representatives of Dikar, set to be taken in Spain, in the above-styled action pursuant to the Federal Rules of Civil Procedure [docket entry 54] IS GRANTED;
>
> 2) deponents' responses in said depositions SHALL NOT be limited to questions concerning only jurisdictional issues;
>
> 3) the motion of the plaintiff to compel defendant Dikar to answer plaintiff's discovery requests which are not related to jurisdictional issues, as the Court had specifically ruled that discovery is to be wide-open and not limited to jurisdictional issues, [docket entry 55] IS GRANTED TO

THE EXTENT THAT DEFENDANT'S ONLY OBJECTION TO SUCH REQUESTS ARE THAT THEY EXCEED THE SCOPE OF JURISDICTIONAL ISSUES; and

4) the motion of the plaintiff for sanctions pursuant to Fed.R.Civ.P. 37(b)(2) for defendant's failure to answer plaintiff's discovery requests in violation of this Court's orders [docket entry 55] IS PASSED UNTIL THE COMPLETION OF TRIAL.

App. 17a.

B. The Decision Of The Court Below

On January 6, 1998, Dikar filed a petition with the United States Court of Appeals for the Sixth Circuit for a writ of mandamus. Dikar sought a writ directing that discovery concerning Dikar be limited to the issue of the district court's personal jurisdiction over Dikar until after the district court determines the personal jurisdiction issue.

Dikar's petition to the Sixth Circuit presented the issues of "[w]hether the Due Process Clause of the United States Constitution allows the district court to require a defendant which is a legal entity of a foreign country to participate in non-jurisdictional discovery prior to a determination by the district court of such defendant's motion to dismiss for lack of personal jurisdiction," App. 120a, as well as "[w]hether a defendant, which is a legal entity of a foreign country that is a signatory of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ('Hague Evidence Convention') and which has moved to dismiss the

action for lack of personal jurisdiction, can be required to submit to discovery under the procedures of the Federal Rules of Civil Procedure on matters unrelated to the personal jurisdiction issue prior to a ruling by the district court that it has personal jurisdiction over such defendant." *Id.*

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With This Court's Prior Decisions.

This Court has observed that "where issues arise as to jurisdiction . . ., discovery is available to ascertain the facts bearing on such issues." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.13 (1978). The Court, however, has never recognized the right of a litigant, where personal jurisdiction is challenged, to obtain discovery under the Federal Rules of Civil Procedure of *non*-jurisdictional facts prior to a district court's determination that it has personal jurisdiction over the parties. Indeed, the decision of the court below to permit such non-jurisdictional discovery to proceed against Dikar, despite the district court's failure to make any finding of personal jurisdiction over Dikar, conflicts with this Court's reasoning in two cases. *See Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982); *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987).

In *Insurance Corp. of Ireland,* this Court determined that, by raising the defense of lack of personal jurisdiction, a defendant "agrees to abide by . . . [the district] court's determination on the issue of jurisdiction." 456 U.S. at 706. The Court therefore held that a district court may order a

defendant challenging personal jurisdiction to participate in discovery under the Federal Rules of Civil Procedure *limited to jurisdictional facts* and may impose sanctions under Rule 37(b)(2) -- including the assumption of jurisdiction -- if the defendant refuses to comply with a court order compelling jurisdictional discovery. *See id.* at 709 (noting that because the defendants had "put the issue [of personal jurisdiction] in question", the defendants "did not have the option of blocking the reasonable attempt of . . . [the plaintiff] to meet its burden of proof" on that issue).

In so ruling the Court implicitly recognized that, until the district court makes a finding that it has personal jurisdiction over the defendant challenging jurisdiction, the district court has no authority to order non-jurisdictional discovery against that defendant. The Court observed that "[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." 456 U.S. at 701. Thus, until the district court determines that it has personal jurisdiction over the party, the district court may not order that party to participate in discovery unless the party has consented to the district court's authority to issue such orders. *See Insurance Corp. of Ireland*, 456 U.S. at 701-07.

The Court held that, by filing an answer challenging personal jurisdiction, the defendant-petitioners in *Insurance Corp. of Ireland* had consented to the district court's jurisdiction to decide the limited issue of whether it had personal jurisdiction over the plaintiff's claims. *See id.* at 706-07. The defendants' challenge to personal jurisdiction did not, however, open the door to non-jurisdictional discovery. Indeed, the Court repeatedly emphasized that the discovery at issue was solely "in order to demonstrate the

court's personal jurisdiction over the" defendants, and no discovery was permitted outside the context of jurisdictional facts. *Id.* at 698; *see also id.* at 695 (noting that the discovery order was "directed at establishing jurisdictional facts"); *id.* at 707 (observing that the question presented involved "the manner in which the court determines whether it has personal jurisdiction"); *id.* at 709 (noting that the plaintiff "was seeking through discovery to respond to" the defendants' "contention that the District Court did not have personal jurisdiction").

After *Insurance Corp. of Ireland*, this Court addressed whether discovery pursuant to the Federal Rules of Civil Procedure, rather than the Hague Evidence Convention, was permissible against the foreign defendants in *Societe Nationale Industrielle Aerospatiale*. The Court specifically noted that the foreign defendants had "answered the complaints, apparently without questioning the jurisdiction of the District Court." 482 U.S. at 525. Thus, the Court concluded that discovery on all issues was available under the Federal Rules of Civil Procedure -- and that the Hague Evidence Convention was an alternative rather than exclusive discovery procedure -- *once personal jurisdiction had been established over the defendant*. The Court, however, did not hold that non-jurisdictional discovery under the Federal Rules of Civil Procedure is permissible prior to a finding of personal jurisdiction. Indeed, the Court specifically noted that the foreign defendants' obligation to shoulder "the burdens associated with American judicial procedures" arose because "the District Court unquestionably ha[d] personal jurisdiction" over them. *Id.* at 540 n. 25; *see also id.* at 524 (noting that the question presented was whether substantive discovery under the Federal Rules of Civil Procedure could proceed against a foreign defendant "*over*

whom the court has personal jurisdiction") (emphasis added); *see also id.* at 553 n.4 (Blackmun, J., concurring in part and dissenting in part, joined by Brennan, Marshall and O'Connor, JJ.) ("It is well established that a court has the power to impose discovery under the Federal Rules of Civil Procedure *when it has personal jurisdiction over the foreign party*") (emphasis added).

Insurance Corp. of Ireland and *Societe Nationale Industrielle Aerospatiale* together establish guidelines for discovery when a foreign defendant moves for dismissal based on lack of personal jurisdiction. Once the defendant files the motion to dismiss, the plaintiff must meet the burden of establishing a basis for the district court's jurisdiction before the case may go forward on the plaintiff's claims. *Insurance Corp. of Ireland* makes clear that the district court has authority to order discovery under the Federal Rules of Civil Procedure "directed at establishing jurisdictional facts", 456 U.S. at 695, because the foreign defendant has consented to such jurisdictional discovery by filing the motion to dismiss. *Societe Nationale Industrielle Aerospatiale* establishes that, if the district court makes a finding of personal jurisdiction, it has the discretion to order further discovery pursuant to the Federal Rules of Civil Procedure on all non-jurisdictional issues rather than follow the procedures set forth in the Hague Evidence Convention. Until a district court determines that it has personal jurisdiction, however, it lacks authority to order non-jurisdictional discovery under the Federal Rules of Civil Procedure, although the plaintiff remains free to seek information relating to non-jurisdictional facts pursuant to the Hague Evidence Convention.

In sum, *Insurance Corp. of Ireland* and *Societe Nationale Industrielle Aerospatiale* are both premised on the proposition, contrary to the decision below, that a district court has no power to order non-jurisdictional discovery under the Federal Rules of Civil Procedure against a party challenging personal jurisdiction until the district court has made a finding that it has personal jurisdiction over that party. Such an order would violate the due process rights of the party because of the absence of any determination by the district court that it has jurisdiction to issue the order.

Based on the reasoning of *Insurance Corp. of Ireland* and *Societe Nationale Industrielle Aerospatiale*, the Court should grant certiorari to preclude all non-jurisdictional discovery under the Federal Rules of Civil Procedure against Dikar in this case unless and until the district court determines that it has personal jurisdiction over Dikar.

B. The Lower Courts Are In Conflict Regarding The Appropriate Standards And Procedures For Discovery When Personal Jurisdiction Is At Issue.

Plenary review is also warranted because there is conflict among the lower courts regarding the proper scope of discovery while the trial court's personal jurisdiction over the parties remains unresolved by that court.

The court below held that it is within the district judge's discretion to permit discovery on all issues to go forward against a defendant challenging personal jurisdiction notwithstanding that there has been no finding of personal jurisdiction over that defendant. *See* App. 2a. In the court of appeals' view, non-jurisdictional discovery in those circumstances is a routine matter involving "the district

court's management of pretrial discovery." *Id.* Indeed, the Sixth Circuit did not even address the due process concern arising from such discovery, despite briefing of that issue by Dikar. *See* App. 120a-124a.

By contrast, other appellate courts have recognized that, when a defendant challenges personal jurisdiction, discovery should be limited to jurisdictional facts until the trial court determines it has personal jurisdiction over that defendant. For example, in *Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990), the Second Circuit held that where the district court's personal and subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, is at issue, "generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until she has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery." *Id.* at 1332.

Similarly, the Eleventh Circuit observed that while "[r]esolution of a pretrial motion that turns on findings of fact -- for example, a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) -- may require some *limited* discovery before a meaningful ruling can be made," that Circuit made clear that district courts should rule on such a dispositive motion before discovery on other issues is permitted to proceed. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (emphasis added).

Along the same lines, the Supreme Court of Appeals of West Virginia recently made clear that discovery is available only "for the *limited* purpose of developing jurisdictional facts when the trial court's jurisdiction has been challenged."

Bowers v. Wurzburg, ___ S.E.2d ___, 1998 WL 86571, at *4 (W. Va. Feb. 26, 1998) (emphasis added); *see also Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 680 (1st Cir. 1992) (noting that, in response to the defendant's motion to dismiss for lack of personal jurisdiction, the plaintiffs "could have requested that the court allow discovery on the *limited* issue of personal jurisdiction") (emphasis added).

The Fifth Circuit generally concurs, recognizing that when a motion to dismiss on personal jurisdiction grounds is filed, the general rule is for discovery to be "confined to the issues raised in the motion to dismiss." *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982); *see also In re Anschuetz & Co.*, 838 F.2d 1362, 1363 (5th Cir. 1988) (emphasizing that discovery under the Federal Rules of Civil Procedure was permissible only "where the party in question was subject to the *in personam* jurisdiction of the United States courts"). That Circuit, however, may allow some discovery of non-jurisdictional facts while a motion to dismiss for lack of personal jurisdiction is pending "[w]hen . . . the jurisdictional question intertwines with the merits of the case." *Wyatt*, 686 F.2d at 283.

The Sixth Circuit accorded great deference to the district court's decision to delay ruling on personal jurisdiction until all discovery is completed. As the Eleventh Circuit has observed, however, "[f]ailure to consider and rule on significant pretrial motions before issuing dispositive orders can be an abuse of discretion." *Chudasama*, 123 F.3d at 1367.

Underlying the Eleventh Circuit's decision in *Chudasama* were concerns about the "significant costs" arising from unnecessary discovery:

> Discovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged. The party seeking discovery also bears costs, including attorneys' fees generated in drafting discovery requests and reviewing the opponent's objections and responses. Both parties incur costs related to the delay discovery imposes on reaching the merits of the case. Finally, discovery imposes burdens on the judicial system; scarce judicial resources must be diverted from other cases to resolve discovery disputes.

123 F.3d at 1367-68.

In light of these concerns, the Eleventh Circuit held that the district court should grant a meritorious motion to dismiss before discovery on issues unrelated to the motion proceeds so that "unnecessary costs to the litigants and to the court system can be avoided." *Id.* at 1368. The court observed by "delaying ruling on a motion to dismiss . . . until after the parties complete discovery encourages abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs." *Id.*

Moreover, the Eleventh Circuit added that the ruling on the motion to dismiss "must be meaningful": "[i]t is not enough simply to deny a motion to dismiss a claim with little or no comment and then revisit the defendant's legal contentions when the defendant files a motion for summary judgment after discovery has concluded." *Id.* at 1368 n.38. In the Eleventh Circuit's view, "district courts simply must not allow the most critical pretrial motions to be carried with the case until the final pretrial conference unless to do so is absolutely necessary." Id.

The district court's decision in this case essentially to "carry" Dikar's motion to dismiss "with the case", and the Sixth Circuit's refusal to interfere with that decision, directly conflict with the Eleventh Circuit's directives in *Chudasama*, as well as the decisions of other appellate courts noted above in which only jurisdictional discovery has been permitted while a motion to dismiss for lack of personal jurisdiction is pending. The Court should grant certiorari to resolve this conflict in favor of those courts that limit discovery to only jurisdictional facts while personal jurisdiction remains at issue.

C. Concerns Of International Comity Support The Grant Of Certiorari.

In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), the Court recognized that, when the defendant resides or is based in a foreign country, concerns of reasonableness are heightened with respect to personal jurisdiction. All of the Justices joined in the portion of Justice O'Connor's opinion in *Asahi* cautioning lower courts to make "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case," guided by

"an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." *Id.* at 115. Members of the Court were also unanimous that "'[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field,'" *id.* (quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)), and that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders," *id.* at 114.[2]

In light of these concerns, it is particularly appropriate for the Court to address the permissible scope of discovery where, as here, personal jurisdiction is challenged by a defendant that is a legal entity of a foreign country. "It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions . . . ." *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 542. In light of this reality, a district court best exercises "[g]reat care and reserve," *Asahi*, 480 U.S. at 115, with respect to a foreign defendant challenging personal jurisdiction when it requires jurisdictional discovery to be completed first and rules on the jurisdictional issues before any non-jurisdictional discovery under the Federal Rules of Civil Procedure is allowed to take place.

---

[2]Under the reasoning of the opinions issued in *Asahi*, the district court lacks personal jurisdiction over Dikar. Petitioner only manufactured and sold guns in Spain to an independent entity and had no involvement in the promotion, distribution or sale of any of those guns in the United States

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

May 22, 1998 Respectfully submitted,

*V. Thomas Fryman, Jr.
Mark T. Hayden
John K. Bush
Thomas H. Stewart
GREENEBAUM DOLL & McDONALD PLLC
1400 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507
(606) 231-8500

Attorneys for Petitioner
**Counsel of Record*

APPENDIX

Court of Appeals' Order filed February 11, 1998 . . . . . Appendix A

District Court's Order for Meeting and Report filed August 5, 1997 . . . . . Appendix B

District Court's Order filed August 19, 1997 . . . . . Appendix C

District Court's Order filed September 22, 1997 . . . . . Appendix D

District Court's Order filed October 8, 1997 . . . . . Appendix E

District Court's Scheduling Order filed October 14, 1997 . . . . . Appendix F

District Court's Order filed December 17, 1997 . . . . . Appendix G

Court of Appeals' Order filed April 23, 1998 . . . . . Appendix H

Constitutional Provisions . . . . . Appendix I

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention) . . . . . Appendix J

Amended Complaint, filed March 31, 1997 . . . . . Appendix K

Motion of Defendant Dikar, S. Coop. LTDA. To Dismiss the Amended Complaint, filed July 30, 1997 . . . . . Appendix L

Affidavit of Jon Muniategui in Support of Motion of Defendant Dikar, S. Coop. LTDA. To Dismiss the Amended Complaint . . . . . Appendix M

Memorandum in Support of Motion of Defendant, Dikar, S. Coop. LTDA. To Dismiss the Amended Complaint, filed July 30, 1997 . . . . . Appendix N

Plaintiff's Response to Dikar's Motion To Dismiss and Plaintiff's Motion for Leave to Take Additional Discovery, filed August 15, 1997 . . . . . Appendix O

Responses and Objections of Defendant Dikar, S. Coop. LTDA. to Plaintiff's First Set of Requests for Production of Documents, filed November 7, 1997 . . Appendix P

Answers and Objections of Defendant Dikar, S. Coop. LTDA. to Plaintiff's First Set of Interrogatories, filed November 7, 1997 . . . . . Appendix Q

District Court's Amended Notice to Take Videotaped Depositions, filed December 22, 1997 . . . . . Appendix R

Petition of Dikar, S. Coop. LTDA. for Writ of Mandamus, filed January 6, 1998 Appendix S

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: DIKAR, S. COOP. LTDA,	)	
	)	
Petitioner.	)	**ORDER**
	)	
	)	

[Filed February 11, 1998]

Before: CONTIE, NORRIS, and CLAY, Circuit Judges.

The petitioner, a foreign defendant in this products liability action, seeks a writ of mandamus directing that discovery in this action be limited to personal jurisdiction issues until after the district court determines whether it can exercise personal jurisdiction over the petitioner. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. It cannot be used to control a district court in the exercise of discretionary duties." *In re American President Lines, Ltd.*, 929 F.2d 226, 227 (6th Cir. 1991)(order)(citations omitted); *see In re Post-Newsweek Stations*, 722 F.2d 325, 329 (6th Cir. 1983).

Generally, mandamus is not available to review discovery orders. *See Warden, Kentucky State Penitentiary v. Gall*, 865 F.2d 786, 788-89 (6th Cir. 1989); *City of Cleveland v. Krupansky*, 619 F.2d 572, 575 (6th Cir.)(per curiam), *cert. denied*, 449 U.S. 834 (1980). In limited circumstances,

however, mandamus is available to review pretrial discovery rulings. Where a discovery ruling raises "questions of unusual importance necessary to the economical and efficient administration of justice," it may be reviewed in mandamus. *FDIC v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990)(quoting *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1060 (6th Cir. 1982)).

We will not exercise our authority in mandamus to intervene in the district court's management of pretrial discovery in this case. The petitioner has not clearly demonstrated that the district court's orders permitting discovery under the Federal Rules of Civil Procedure are erroneous as matter of law. *See Societe Nationale Industrielle Aerospatiale v. United States District Court of the Southern District of Iowa*, 482 U.S. 522, 541 (1987)(holding that the Hague Convention procedures for taking evidence abroad are not exclusive or mandatory).

It therefore is **ORDERED** that the petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-28

MATTHEW HAYMAKER PLAINTIFF

VS.

CONNECTICUT VALLEY ARMS,
ET AL DEFENDANTS

ORDER FOR MEETING AND REPORT

[Filed August 5, 1997]

Pursuant to the Federal Rules of Civil Procedure, the Court hereby ORDERS:

(1) NO LATER THAN SEPTEMBER 5, 1997, counsel for the parties shall CONDUCT the meeting of parties required by Rule 26(f) to discuss the nature and basis of their claims and defenses and the possibilities of a prompt settlement or resolution of the case and to develop a proposed discovery plan;

(2) AT THE TIME OF THE MEETING, counsel for the parties shall EXCHANGE the disclosures required by Rule 26(a)(1) and, in the future, shall MAKE supplemental disclosures when required by Rule 26(e); and

(3) NO LATER THAN SEPTEMBER 15, 1997, counsel for the parties shall FILE a written joint report of the meeting advising the Court as to the following information:

(a) the views and proposals required by Rule 26(f);

(b) the length of time counsel reasonably believe will be necessary to complete all pretrial discovery;

(c) the length of time counsel reasonably believe will be necessary to file dispositive motions;

(d) the probable length of trial and whether there will be issues to submit to a jury; and

(e) the dates that are mutually convenient with counsel to assign this case for trial.

Counsel may refer to Federal Rules of Civil Procedure Appendix Form 35 as to the form of the joint report.

THE COURT REQUIRES STRICT COMPLIANCE WITH THE TERMS OF THIS ORDER. FAILURE TO COMPLY WILL RESULT IN THE IMPOSITION OF SANCTIONS.

This the 5th day of August, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CIVIL ACTION NO. 97-28

MATTHEW HAYMAKER PLAINTIFF

V.

CONNECTICUT VALLEY ARMS;

AND

WAL-MART STORES, INC. DEFENDANTS

ORDER

[Filed August 19, 1997]

The Defendant Dikar, S. Coop. LTDA having moved to dismiss the Complaint against it, on the ground of lack of personal jurisdiction, the Plaintiff having responded, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the Plaintiff's motion for leave to conduct additional discovery is GRANTED.

Following the completion of all discovery, the Defendant Dikar may renew any dispositive motion concerning jurisdictional issues.

This 19th day of August, 1997.

/s/ Karl S. Forester
JUDGE, U.S. DISTRICT COURT

COPIES TO COUNSEL

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL NO. 97-28

MATTHEW HAYMAKER PLAINTIFF

VS.

CONNECTICUT VALLEY ARMS,
et al DEFENDANTS

ORDER

[Filed September 22, 1997]

IT IS ORDERED, that the Motion of defendant Dikar, S. Coop. LTDA. for Modification of Orders of August 5, 1997, and August 19, 1997, be and it is hereby denied.

IT IS FURTHER ORDERED,

(1) NO LATER THAN SEPTEMBER 30, 1997, counsel for the parties shall CONDUCT the meeting of parties required by Rule 26(f) to discuss the nature and basis of their claims and defenses and the possibilities of a prompt settlement or resolution of the case and to develop a proposed discovery plan;

(2) AT THE TIME OF THE MEETING, counsel for the parties shall EXCHANGE the disclosures required by Rule

26(a)(1) and, in the future, shall MAKE supplemental disclosures when required by Rule 26(e); and

(3) NO LATER THAN OCTOBER 10, 1997, counsel for the parties shall FILE a written joint report of the meeting advising the Court as to the following information:

(a) the views and proposals required by Rule 26(f);

(b) the length of time counsel reasonably believe will be necessary to complete all pretrial discovery;

(c) the length of time counsel reasonably believe will be necessary to file dispositive motions;

(d) the probable length of trial and whether there will be issues to submit to a jury; and

(e) the dates that are mutually convenient with counsel to assign this case for trial.

Counsel may refer to Federal Rules of Civil Procedure Appendix Form 35 as to the form of the joint report.

THE COURT REQUIRES STRICT COMPLIANCE WITH THE TERMS OF THIS ORDER. FAILURE TO COMPLY WILL RESULT IN THE IMPOSITION OF SANCTIONS.

This the 22nd day of September, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL NO. 97-28

MATTHEW HAYMAKER, PLAINTIFF

V.

CONNECTICUT VALLEY ARMS; WAL-MART STORES, INC.; DIKAR, S. COOP LTDA; and GENE SEARS SUPPLY COMPANY, DEFENDANTS

ORDER

[Filed October 8, 1997]

This matter is before the Court upon the Motion of the defendant, Dikar, S. Coop LTDA ("Dikar") for modification of the Orders this Court entered on August 5 and 19, 1997, to wit, the Order for Meeting and Report and the Order granting open discovery as opposed to limited discovery pertaining only to the personal jurisdiction issue. Moreover, Dikar requests that if this Court denies its Motion to Modify said Orders, that the Court certify the issue pursuant to 28 U.S.C. § 1292(b) for appellate review and stay the respective orders pending resolution of the appeal. The Court, having read the parties' briefs and remaining confident in its previous ruling and being otherwise fully and sufficiently advised, HEREBY ORDERS THAT DEFENDANT'S MOTION TO

MODIFY SAID ORDERS [docket entry 28] IS DENIED. FURTHER, THIS ISSUE SHALL NOT BE CERTIFIED FOR APPEAL.

This 8th day of October, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-28

MATTHEW HAYMAKER PLAINTIFF

VS.

CONNECTICUT VALLEY
ARMS, ET AL DEFENDANT

SCHEDULING ORDER

[Filed October 14, 1997]

Pursuant to Federal Rule of Civil Procedure 16, the Court, having considered the joint report of the parties' meeting, hereby ORDERS:

(1) NO LATER THAN JANUARY 2, 1998, counsel for the parties shall DISCLOSE the identity of expert witnesses who may be used at trial and written reports by the expert witnesses as required by Rule 26(a)(2) and shall DISCLOSE WITHIN 30 DAYS THEREAFTER the identity of expert witnesses and written reports if the evidence is intended SOLELY to contradict or rebut other expert witnesses;

(2) NO LATER THAN APRIL 1, 1998, counsel for the parties shall COMPLETE all pretrial discovery and shall FILE all motions to amend pleadings;

(3) NO LATER THAN MAY 1, 1998, counsel for the parties shall FILE all dispositive motions;

(4) NO LATER THAN JULY 20, 1998, counsel shall FILE with the Clerk an original, shall SUBMIT a copy to the Court's Chambers, and shall PROVIDE a copy to opposing counsel of the following:

(a) pursuant to Rule 26(a)(3)(A), a WITNESS LIST with a brief summary of the expected testimony of each witness; pursuant to Rule 26(a)(3)(B), the witness list shall INCLUDE the designation of those witnesses whose testimony is expected to be presented by deposition WITH REFERENCES TO THE PAGES AND THE QUESTIONS TO BE PRESENTED; and, if the deposition was not taken stenographically, a transcript of the pertinent portions of the deposition testimony shall be attached to the witness list;

(b) pursuant to Rule 26(a)(3)(C), a LIST OF EXHIBITS intended to be used at trial; and

(c) a PRETRIAL MEMORANDUM containing a succinct statement of the facts of the case, the questions of fact, the questions of law, expected evidentiary objections, and a listing of all pending motions;

(5) NO LATER THAN JULY 20, 1998, counsel shall PRE-MARK all exhibits with the appropriate exhibit sticker with NUMBERS IN THE ORDER TO BE INTRODUCED AT

TRIAL and shall PROVIDE copies of such exhibits to opposing counsel;

(6) NO LATER THAN JULY 20, 1998, counsel shall CONDUCT a conference in person or by telephone to formulate AGREED proposed jury instructions on the SUBSTANTIVE LAW of the case;

(7) NO LATER THAN JULY 27, 1998, the parties shall conduct a good faith settlement conference; and, if this action is settled by the parties, counsel shall promptly notify the Court;

(8) NO LATER THAN JULY 27, 1998, counsel shall FILE with the Clerk, shall SUBMIT a copy to the Court, and shall PROVIDE a copy to opposing counsel of any objections, and responses to same, to the use of depositions or to the admissibility of exhibits pursuant to Rule 26(a)(3), and objections not disclosed, other than objections based on Federal Rules of Evidence 402 and 403, shall be deemed WAIVED unless excused by the Court for good cause shown. Objections to the admissibility of exhibits shall contain the exhibit number and a brief description of the exhibit. A copy of any documentary exhibit, to which objections to admissibility have been filed, shall be furnished to the Court.

(9) this action is ASSIGNED for PRETRIAL CONFERENCE on MONDAY, AUGUST 3, 1998, at 10:00 A.M.; the attorneys who will be trying this action and the parties to this action shall be present at the pretrial conference; where a party to the action is not an individual, said party shall have in attendance, at the pretrial conference, a representative with full settlement authority;

(10) at the time of the pretrial conference, counsel shall FILE with the Clerk and shall SUBMIT a copy to the Court of the AGREED proposed jury instructions on the SUBSTANTIVE LAW of the case; if any instruction cannot be agreed to, counsel shall file with the Clerk, shall submit a copy to the Court, and shall provide a copy to opposing counsel of their proposed instruction with supporting authority; and, if counsel have the available means, the hard copy shall be accompanied by a copy on a 3 1/2" disk in a format compatible with WordPerfect;

(11) TWO WORKING DAYS prior to the trial of this action, counsel shall SUBMIT to the Court's Chambers a copy of each documentary exhibit; and

(12) this action is ASSIGNED for TRIAL BY JURY on TUESDAY, SEPTEMBER 8, 1998, at 9:00 a.m.

(13) **ALL DISCOVERY DISPUTES ARE REFERRED TO MAGISTRATE JUDGE JAMES B. TODD FOR RESOLUTION, PURSUANT TO TITLE 28, SECTION 636(B)(1)(A), F.R.CIV.P. BEFORE FILING A WRITTEN MOTION REGARDING A DISCOVERY DISPUTE, THE PARTIES TO THIS ACTION SHALL FIRST ATTEMPT TO RESOLVE THE DISPUTE AMONG THEMSELVES. IF THE PARTIES ARE UNABLE TO RESOLVE THE DISPUTE, THEY SHALL ATTEMPT TO RESOLVE THE MATTER WITH THE MAGISTRATE JUDGE BY TELEPHONE. ONLY, AFTER BOTH OF THESE METHODS ARE ATTEMPTED WITHOUT SUCCESS, SHOULD THE PARTIES FILE WRITTEN MOTIONS REGARDING THE DISCOVERY DISPUTE. ANY WRITTEN MOTION REGARDING FAILURE TO MAKE A DISCLOSURE REQUIRED BY RULE 26(a)**

SHALL INCLUDE THE CERTIFICATION REQUIRED BY RULE 37(a)(2)(A).

THE COURT REQUIRES STRICT COMPLIANCE WITH THE TERMS OF THIS ORDER. FAILURE TO COMPLY WILL RESULT IN THE IMPOSITION OF SANCTIONS.

This the 14 day of October, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-028

MATTHEW HAYMAKER, PLAINTIFF,

V.

CONNECTICUT VALLEY ARMS; WAL-MART STORES, INC.; DIKAR, S. COOP. LTDA.; and GENE SEARS SUPPLY CO., DEFENDANTS.

ORDER

[Filed December 17, 1997]

This matter is before the Court upon the motion of the plaintiff, Matthew Haymaker, to conduct the depositions of representatives of Dikar, S. Coop. LTDA ("Dikar"), set to be taken in Spain, in the above-styled action pursuant to the Federal Rules of Civil Procedure [docket entry 54], and upon plaintiff's motion to compel defendant Dikar, S. Coop. LTDA, to answer plaintiff's discovery requests and for sanctions [docket entry 55]. Defendant filed its response to the same on December 8, 1997 [docket entry 61], to which plaintiff filed his reply on December 10, 1997 [docket entry 63]. Accordingly, all matters are ripe for review.

The Court, being otherwise fully and sufficiently advised, hereby ORDERS THAT:

1) the motion of the plaintiff to conduct the depositions of representatives of Dikar, set to be taken in Spain, in the above-styled action pursuant to the Federal Rules of Civil Procedures [docket entry 54], IS GRANTED;

2) deponents' responses in said depositions SHALL NOT be limited to questions concerning only jurisdictional issues;

3) the motion of the plaintiff to compel defendant Dikar to answer plaintiff's discovery requests which are not related to jurisdictional issues, as the Court had specifically ruled that discovery is to be wide-open and not limited to jurisdictional issues, [docket entry 55] IS GRANTED TO THE EXTENT THAT DEFENDANT'S ONLY OBJECTION TO SUCH REQUESTS ARE THAT THEY EXCEED THE SCOPE OF JURISDICTIONAL ISSUES; and

4) the motion of the plaintiff for sanctions pursuant to Fed.R.Civ.P. 37(b)(2) for defendant's failure to answer plaintiff's discovery requests in violation of this Court's orders [docket entry 55] IS PASSED UNTIL THE COMPLETION OF TRIAL.

This 17th day of December, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re	)	
DIKAR, S. COOP. LTDA,	)	**ORDER**
Petitioner	)	

[Filed April 23, 1998]

BEFORE: CONTIE, NORRIS, and CLAY, Circuit judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX I

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS (HAGUE EVIDENCE CONVENTION)

23 U.S.T. 2555; T.I.A.S. No. 7444

The States signatory to the present Convention.

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions --

Chapter I

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify --

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed. Where appropriate, the Letter shall specify, inter alia --

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or

translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence insofar as he has a privilege or duty to refuse to give the evidence --

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that --

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the

approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

Chapter II

Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if --

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if --

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case;
and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent

authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, inter alia, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any article of this chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence --

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the

above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

Chapter III

General Clauses

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to

compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from --

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from --

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8 to 16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the 60th day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following --

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the 60th day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the 60th day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justices may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the 60 day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the 60th day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the 60th day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following --

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

[Signatures and Annex omitted.]

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CIVIL ACTION NO. 97-28

MATTHEW HAYMAKER PLAINTIFF

V.

CONNECTICUT VALLEY ARMS;

WAL-MART STORES, INC.;

AND

GENE SEARS SUPPLY CO.
Serve: Ky. Sec. of State DEFENDANTS

AMENDED COMPLAINT

[Filed March 31, 1997]

* * * * * *

Comes now the Plaintiff, Matthew Haymaker, and for his Complaint herein, states as follows:

COUNT I

1. The Defendant Connecticut Valley Arms is a foreign corporation whose home office address is 5988 Peachtree

Corners East, Norcross GA 30071. By virtue of KRS 454.210, this Defendant has appointed the Kentucky Secretary of State as its agent for service of process.

2. The Defendant Wal-Mart Stores, Inc. is a Delaware corporation authorized to do business in this Commonwealth.

3. The Defendant Dikar, S. Coop. LTDA, is a foreign corporation whose home office address is Urarte Kalea 26, Poligono Industrial San Lorenzo, 20570 Bergara, Spain. By virtue of KRS 454.210, this Defendant has appointed the Kentucky Secretary of State as its agent for service of process.

4. The Defendant Gene Sears Supply Company is a foreign corporation whose home office address is P.O. Box 38, El Reno, Oklahoma 73036. By virtue of KRS 454.210, this Defendant has appointed the Kentucky Secretary of State as its agent for service of process.

COUNT II

1. Prior to October 1, 1996, the Defendants Dikar, S. Coop. LTDA; Connecticut Valley Arms; and Gene Sears Supply Company designed, manufactured, marketed and distributed an inline muzzle-loader .50-caliber rifle, Serial Number 61-13-031146-96.

2. On September 26, 1996, the Defendant Wal-Mart Stores, Inc. sold the said inline muzzle-loader .50-caliber rifle to the public.

3. On October 1, 1996, in Scott County, Kentucky, the Plaintiff Matthew Haymaker was injured when the inline

muzzle loader .50-caliber rifle exploded while being fired. At said time and place, the rifle was being used in a reasonably foreseeable manner by the Plaintiff.

COUNT III

1. Defendant Dikar, S. Coop. LTDA, should be held strictly liable as the designer, manufacturer, distributor and seller of said inline muzzle-loader .50-caliber rifle, which was in a defective condition and unreasonably dangerous to expected users.

2. Defendant Dikar, S. Coop. LTDA, as designer, manufacturer, distributor and seller, as well as through its marketing of this product, made implied and express warranties that the rifle was reasonably fit for the general uses and purposes intended, and that it was free of any defects in its design or construction.

3. Defendant Dikar, S. Coop. LTDA, negligently designed, manufactured, marketed and distributed said rifle in such a manner that it created an unreasonable risk of physical harm and injury; this negligence included, but was not limited to, improper and dangerous design, testing and inspection.

4. Defendant Dikar, S. Coop. LTDA, unreasonably failed to warn of the known and foreseeable hazards of said rifle, both before and after the sale of the rifle.

5. The injuries to the Plaintiff are a direct and proximate result of these actions and omissions on the part of the Defendant Dikar, S. Coop. LTDA.

COUNT IV

1. Defendant Connecticut Valley Arms should be held strictly liable as the designer, manufacturer, distributor and seller of said inline muzzle-loader .50-caliber rifle, which was in a defective condition and unreasonably dangerous to expected users.

2. Defendant Connecticut Valley Arms, as designer, manufacturer, distributor and seller, as well as through its marketing of this product, made implied and express warranties that the rifle was reasonably fit for the general uses and purposes intended, and that it was free of any defects in its design or construction.

3. Defendant Connecticut Valley Arms negligently designed, manufactured, marketed and distributed said rifle in such a manner that it created an unreasonable risk of physical harm and injury; this negligence included, but was not limited to, improper and dangerous design, testing and inspection.

4. Defendant Connecticut Valley Arms unreasonably failed to warn of the known and foreseeable hazards of said rifle, both before and after the sale of the rifle.

5. The injuries to the Plaintiff are a direct and proximate result of these actions and omissions on the part of the Defendant Connecticut Valley Arms.

COUNT V

1. Defendant Gene Sears Supply Company should be held strictly liable as the designer, manufacturer, distributor and seller of said inline muzzle-loader .50-caliber rifle, which was in a defective condition and unreasonably dangerous to expected users.

2. Defendant Gene Sears Supply Company, as designer, manufacture, distributor and seller, as well as through its marketing of this product, made implied and express warranties that the rifle was reasonably fit for the general uses and purposes intended, and that it was free of any defects in its design or construction.

3. Defendant Gene Sears Supply Company negligently designed, manufactured, marketed and distributed said rifle in such a manner that it created an unreasonable risk of physical harm and injury; this negligence included, but was not limited to, improper and dangerous design, testing and inspection.

4. Defendant Gene Sears Supply Company unreasonably failed to warn of the known and foreseeable hazards of said rifle, both before and after the sale of the rifle.

5. The injuries to the Plaintiff are a direct and proximate result of these actions and omissions on the part of the Defendant Gene Sears Supply Company.

COUNT VI

1. The Defendant Wal-Mart Stores, Inc. should be held strictly liable to the Plaintiff as the seller of the inline muzzle-loader .50-caliber rifle, which was defective and unreasonable dangerous to foreseeable users.

2. The Defendant Wal-Mart Stores, Inc. negligently marketed and sold the inline muzzle-loader .50-caliber rifle in such a manner that it created an unreasonable risk of physical harm and injury.

3. The Defendant Wal-Mart Stores, Inc., as seller of the rifle, gave implied and express warranties that the product was reasonably fit for the general uses and purposes intended, and that it free of any defects.

4. The Defendant Wal-Mart Stores, Inc. unreasonably failed to warn the Plaintiff and other users of the known and foreseeable hazards of the rifle, both before and after the sale.

5. The injuries to the Plaintiff are a direct and proximate result of these actions and omissions on the part of the Defendant Wal-Mart Stores, Inc.

COUNT VII

1. As a direct and proximate result of the injuries to the Plaintiff, which are permanent and disabling in nature, he is entitled to recover the following damages:

a. Medical, hospital, nursing, rehabilitation and related care expenses, both in the past and throughout his lifetime;

b. Physical pain and mental suffering, both past and future;

c. Lost wages to the time of trial;

d. Permanent impairment of his power and ability to earn income.

WHEREFORE, the Plaintiff Matthew Haymaker demands judgment against the Defendants Dikar, S. Coop. LTDA; Connecticut Valley Arms; Gene Sears Supply Company; and Wal-Mart Stores, Inc., each in a sum in excess of any minimum jurisdictional amount of this court, interest, his costs herein expended, trial by jury and all other relief to which he may appear entitled.

Respectfully submitted,

PETER PERLMAN LAW OFFICES, P.S.C.
388 SOUTH BROADWAY
LEXINGTON, KENTUCKY 40508
TELEPHONE: (606) 253-3919

/s/ Peter Perlman
ATTORNEY FOR PLAINTIFFS

[Certificate of Service omitted]

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

MATTHEW HAYMAKER,	)	
Plaintiff,	)	
v.	)	Civil Action No. 97-28
CONNECTICUT VALLEY ARMS, WAL-MART STORES, INC., DIKAR, S. COOP. LTDA., AND GENE SEARS SUPPLY CO.,	)	
Defendants.	)	

MOTION OF DEFENDANT DIKAR, S. COOP. LTDA. TO DISMISS THE AMENDED COMPLAINT

[Filed July 30, 1997]

Defendant Dikar, S. Coop. LTDA. ("Dikar"), by counsel, hereby moves to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(2) on the ground that the Court lacks personal jurisdiction over Dikar. In support of this motion, Dikar submits a memorandum, filed herewith, and the affidavit of Jon Muniategui, General Director of Dikar, a facsimile copy

of which is attached hereto. [Footnote omitted] The memorandum and affidavit are expressly incorporated herein.

A proposed Order granting this motion is also tendered herewith.

Respectfully submitted,

/s/ John K. Bush
Thomas Fryman, Jr.
Mark T. Hayden
John K. Bush
GREENEBAUM DOLL &
McDONALD PLLC
1400 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507
(606) 231-8500

COUNSEL FOR DEFENDANT
DIKAR, S. COOP. LTDA.

[Certificate of Service omitted]

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CIVIL ACTION NO. 97-28

MATTHEW HAYMAKER PLAINTIFF

V.

CONNECTICUT VALLEY ARMS;
WAL-MART STORES, INC.;
DIKAR S. COOP. LTDA; and
GENE SEARS SUPPLY CO. DEFENDANTS

AFFIDAVIT OF JON MUNIATEGUI IN SUPPORT OF MOTION OF DEFENDANT DIKAR, S. COOP LTDA. TO DISMISS THE AMENDED COMPLAINT

[Facsimile Copy Filed July 30, 1997;
Original filed July 31, 1997]

I, Jon Muniategui, being first sworn on oath, deposes and states as follows:

1. I am General Director of Dikar, S. Coop. LTDA. ("Dikar"), a Spanish cooperative located in Bergara, Spain. I have been an employee of Dikar for fourteen years. I have personal knowledge of all of the facts stated herein.

2. This affidavit is submitted in support of Dikar's motion to dismiss the amended complaint in the above-

captioned case on the ground that the Court lacks personal jurisdiction over Dikar.

3. Dikar is a cooperative organized and existing under the laws of Spain. The cooperative is wholly owned by its approximately sixty employees. Dikar engages in the business of manufacturing sporting guns.

4. Neither I nor any other Dikar employee to my knowledge has ever visited Kentucky. Prior to plaintiff's commencement of this lawsuit, no one at Dikar to my knowledge had ever communicated with anyone located in Kentucky by telephone, mail, facsimile or otherwise.

5. To my knowledge, Dikar has never directly sold any product or service to anyone located in Kentucky. Dikar does not maintain any office, factory or other place of business in Kentucky or anywhere else in the United States, nor does Dikar own any property located in the United States. Dikar does not have any parent, subsidiary or affiliate incorporated or doing business in Kentucky or any other state of the United States. Dikar has never designated any agent to accept service of process in Kentucky, nor has Dikar ever been authorized by Kentucky to conduct business in the Commonwealth. Dikar does not have any regular channel (by telephone, mail, facsimile or otherwise) to answer retail consumer questions or to provide advice, instructions or other information to retail customers in Kentucky or any other state. None of Dikar's employees reside in the United States, and Dikar does not advertise its products in Kentucky or anywhere else in the United States.

6. Dikar does not employ any sales staff or any direct distributors of its sporting guns, and it does not engage in any

retail sales of its sporting guns. Dikar engages solely in the manufacture of its sporting guns, which it sells at the wholesale level to independent companies and other entities.

7. I have read the amended complaint filed in the above-captioned case. In particular, I am aware that plaintiff alleges that he was injured through the use of an inline muzzle-loader .50-caliber rifle, Serial Number 61-13-031146-96. Based upon this pleading, it appears that Dikar manufactured the particular sporting rifle that is the subject of the action and other rifles of the same model at its factory in Bergara, Spain, at the request of defendant Connecticut Valley Arms ("CVA"). This specific model, commonly known as the "Buckmaster Stag Horn", was based upon an original design by Dikar, and was intended for use in Europe, Canada and the United States. The particular rifles purchased by CVA were manufactured according to a specification sheet, attached as Exhibit 1, which was prepared based upon CVA's specifications.

8. Dikar's name does not appear anywhere on the rifle purchased by plaintiff or on the box, packaging, instructions, warnings and other materials that accompanied the gun when it was sold to plaintiff. Indeed, CVA specified that only its name be be [sic] identified on the gun as its manufacturer, as evidenced by the stamping instructions on the specification sheet attached as Exhibit 1.

9. Dikar sold the rifle at issue as part of a larger sale of guns to CVA on June 28, 1996. The sale was FOB, with CVA assuming possession and title of the rifles in Spain at the time of the sale and bearing all transportation costs and risk of loss from that point forward. Copies of the invoice, bill of lading and Spanish customs document are attached hereto as Exhibits 2, 3 and 4, respectively.

10. Dikar has no common ownership or other business relationship with CVA other than as manufacturer of guns purchased by CVA. All of Dikar's sales to CVA have been transactions solicited and initiated by CVA.

11. Dikar understood that CVA was authorized to sell Dikar-manufactured rifles anywhere in the United States and Canada, and Dikar placed no restrictions or limitations on CVA's distribution in those geographic areas. After selling the rifle at issue to CVA, Dikar had no involvement in any subsequent sale of the product. Prior to Dikar's sale to CVA, there were never any discussions, correspondence or other communications between Dikar and CVA regarding any particular state or region of the United States where the rifles would be sold. In particular, I am not aware of any communication between Dikar and CVA in which Dikar was made aware that any of the rifles was to be sold to any person in Kentucky.

12. Sporting guns are the only products manufactured by Dikar that are ultimately purchased by consumers in the United States. CVA is the only company that distributes Dikar-manufactured sporting guns in the United States. Dikar has no way of knowing how many of these guns ultimately are sold to customers located in Kentucky, as such information has never been provided to Dikar by CVA or any other defendant.

13. To my knowledge, Dikar's name has never appeared in any advertisement, press release or other promotion initiated by CVA or any other defendant, or any of their agents, in any printed or broadcast media in the United States. I am not aware that Dikar has ever been mentioned in any advertisement, press release or other promotional material printed or distributed by or to anyone in Kentucky.

14. The cause of action alleged in the amended complaint filed in the above-captioned case does not arise from any transaction of business within Kentucky by Dikar, nor from the commission of any tortious act within Kentucky by Dikar, nor from the ownership, possession, or use of any real property within Kentucky by Dikar.

I hereby declare, under penalty of perjury under the laws of Spain, that the foregoing is true and correct to the best of my knowledge and belief. Further affiant sayeth not.

/s/ Jon Muniategui
Jon Muniategui
General Director
Dikar, S. Coop. LTDA.

[Notarization and Exhibits omitted.]

APPENDIX N

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

MATTHEW HAYMAKER,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 97-28
CONNECTICUT VALLEY ARMS, WAL-MART STORES, INC., DIKAR, S. COOP. LTDA., AND GENE SEARS SUPPLY CO.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT, DIKAR, S. COOP. LTDA. TO DISMISS THE AMENDED COMPLAINT

[Filed July 30, 1997]

Introduction

Defendant Dikar, S. Coop. LTDA. ("Dikar") respectfully submits this memorandum in support of its motion to dismiss the amended complaint pursuant to Fed. R.

Civ. P. 12(b)(2) on the ground that the Court lacks personal jurisdiction over Dikar.

Dikar is a Spanish cooperative, owned by its approximately sixty employees, which operates a sporting gun factory in rural Spain. As discussed more fully below, Dikar has never sold, advertised, promoted or marketed any product or service in Kentucky, has never owned any property in the Commonwealth, or otherwise conducted business there. Indeed, prior to this lawsuit, Dikar never had *any* contact with Kentucky. None of its employees had ever visited the Commonwealth or communicated with anyone there. Moreover, Dikar does not sell or advertise any products or services anywhere else in the United States. In fact, the only Dikar-manufactured products sold in the United States are sporting guns produced by Dikar and sold in Spain to an independent company, defendant Connecticut Valley Arms, Inc. ("CVA"), which in turn markets, promotes and sells them under its own name and through its own efforts.

Indeed, CVA holds itself out to the American buying public as the manufacturer of the guns produced by Dikar for CVA. CVA's name alone is listed as the manufacturer on each gun and on all documentation (including packaging, instructions, warnings, brochures and catalogues) given to consumers. At CVA's insistence, Dikar's name does not appear on any gun or on any other materials provided to retail customers in the United States.

The rifle apparently purchased and used by plaintiff was sold by Dikar to CVA in Spain. According to the amended complaint, the rifle at issue made its way to plaintiff through the distribution of CVA, defendant Gene Sears Supply Company ("Gene Sears"), and defendant Wal-Mart Stores,

Inc. ("Wal-Mart"), which ultimately sold the rifle to plaintiff. Dikar never had any contact with plaintiff, and CVA was the only defendant to whom Dikar sold any rifle in the chain of distribution. CVA assumed possession and title of the Dikar-manufactured guns in Spain and had complete discretion as to where and to whom they would be sold in the United States and Canada.

Under the relevant case law, it is clear that Dikar's activity in Spain falls far short of the conduct necessary for this Court to exercise personal jurisdiction over Dikar in Kentucky. The Supreme Court of the United States and the United States Court of Appeals for the Sixth Circuit have recently emphasized constitutional limitations on the exercise of personal jurisdiction over companies based in foreign countries, recognizing concerns of international comity and fairness with respect to such a foreign defendant, which must travel several thousand miles to defend itself before the tribunal of another country in an alien proceeding. Several cases have held that where, as here, a foreign manufacturer merely produces a product and sells it to an independent distributor outside the forum state, with no significant involvement in the marketing, distribution or sale of the product in the forum state, the forum state has no personal jurisdiction over the foreign manufacturer. Indeed, the "basis" for jurisdiction over Dikar in this case is even weaker than in other cases where personal jurisdiction was not established, given that CVA represented itself to American consumers as the manufacturer of the rifles, with no mention of Dikar. Accordingly, the amended complaint against Dikar should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(2).

Statement

Plaintiff commenced this action in the Circuit Court of Scott County on or about December 27, 1996. CVA and Wal-Mart were the original defendants; Dikar was not named in that pleading. CVA and Wal-Mart removed the case to this Court on January 28, 1997.

Plaintiff filed an amended complaint on March 19, 1997, adding Dikar and Gene Sears as defendants. Plaintiff asserted state-law claims against Dikar for strict liability, breach of implied and express warranty, negligence and failure to warn. Dikar's motion to dismiss is being filed on July 30, 1997. Plaintiff has agreed that the time for Dikar to serve a motion or answer with respect to the amended complaint will not expire prior to July 31, 1997.

The amended complaint states that Dikar "is a foreign corporation whose home office address" is in Bergara, Spain. (Amended Complaint ¶ 3). Plaintiff alleges that he was injured while using a rifle designed and manufactured by Dikar. (*Id.* ¶¶ 3, 4). The amended complaint, however, does not allege that Dikar has engaged in any activity having any contact in Kentucky relating to the facts giving rise to Plaintiff's claims. Indeed, there is no allegation that Dikar has *ever* had any contact with Kentucky.

The amended complaint fails to allege that Dikar has any contact with Kentucky for good reason. No such allegation can be made in good faith. As the affidavit of Dikar's General Director (Jon Muniategui) makes clear, Dikar has never sold, advertised, marketed or promoted any of its products in Kentucky or otherwise had any contact with the Commonwealth during Dikar's entire existence. (*See, e.g.*,

Affidavit of Jon Muniategui ¶¶ 4-6, 13-14, attached to the motion to dismiss). Indeed, prior to this lawsuit, no Dikar employee had ever visited Kentucky or otherwise communicated with anyone in the Commonwealth. (*Id.* ¶ 4). Dikar has never maintained any office, factory or other place of business in Kentucky, nor has it ever had any property in the Commonwealth or any parent, subsidiary or affiliate incorporated or doing business there. (*Id.* ¶ 5). Furthermore, Dikar does not have any regular channel (by telephone, mail, facsimile or otherwise) to answer consumer questions or to provide advice, instructions or other information to customers in Kentucky. (*Id.*)

Dikar is a small Spanish cooperative, wholly owned by its approximately sixty employees. (*Id.* ¶ 1). It is organized and existing under the laws of Spain. (*Id.* ¶ 3). The cooperative operates a factory in rural Spain that produces sporting guns. (*Id.* ¶ 7). It does not employ any sales staff for its guns, nor does it engage in any direct distribution or retail sales of these products in the United States. (*Id.* ¶ 6). Dikar only manufactures its guns, which it sells at the wholesale level to independent companies and other entities. (*Id.*).

It appears from the amended complaint that Dikar manufactured the sporting rifle that Plaintiff alleges caused his injury. (*Id.* ¶ 7). The model of this particular rifle, commonly known as the "Buckmaster Stag Horn", was based on an original design by Dikar, and intended for general use not only in the United States, but also in Canada and Europe. (*Id.*) This rifle and other guns were sold FOB to CVA on June 28, 1996, with CVA assuming possession and title of the guns in Spain at the time of the sale and bearing all subsequent transportation costs and risk of loss. (*Id.* ¶ 9).

The sporting rifle that plaintiff allegedly purchased, as well as the accompanying materials and packaging, all bore the name of CVA as manufacturer, per CVA's request. (*Id.* ¶ 8). Dikar's name does not appear anywhere on the rifle or other items that went with it to the customer. (*Id.*)

CVA has no common ownership or affiliation with Dikar, and has no business relationship with Dikar other than as purchaser of guns manufactured by Dikar. (*Id.* ¶ 10). All of Dikar's sales to CVA have been solicited and initiated by CVA. (*Id.*) CVA has complete discretion to sell Dikar's guns anywhere in the United States and Canada. (*Id.* ¶ 11). After delivering possession to CVA in Spain, Dikar had no involvement in any subsequent sale of the rifle at issue. (*Id.* ¶ 11).

Standard For Ruling On Motion To
Dismiss For Lack Of Personal Jurisdiction

This Court may exercise personal jurisdiction over Dikar in this diversity action "only to the extent that a court of the forum state could do so." *Kerry Steel, Inc. v. Paragon Industries, Inc.*, 106 F.3d 147, 148 (6th Cir. 1997); *see also, e.g., International Technologies Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386, 391 (6th Cir. 1997) ("*International Technologies*"). Thus, Dikar "must be amenable to suit under the forum state's long-arm statute and the due process requirements of the [Fourteenth Amendment of the United States] Constitution must be met." *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110, 1115 (6th Cir. 1994), *cert. denied*, 513 U.S. 962 (1994); *see, e.g., Kerry Steel*, 106 F.3d at 149. For purposes of the present motion, Dikar assumes that the long-arm statute pertinent here, KRS 454.210, authorizes this Court to exercise *in personam*

jurisdiction over Dikar if the mandates of federal due process are satisfied. *See, e.g., Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 542 (6th Cir.) (determining that KRS 454.210 permits Kentucky courts to reach the full constitutional limits of federal due process in exercising personal jurisdiction over nonresidents), *cert. denied*, 510 U.S. 914 (1993).

Plaintiff has the burden to prove that the Court has personal jurisdiction over Dikar. *See, e.g., International Technologies*, 107 F.3d at 391; *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). To make this showing, plaintiff must establish that this Court has either general or specific jurisdiction over Dikar. *See, e.g., Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414-15 & nn.8-10 (1984) ("*Helicopteros*"); *Kerry Steel*, 106 F.3d at 149. General jurisdiction exists only if Dikar "has continuous and systematic contacts with" Kentucky "sufficient to justify the state's exercise of judicial power with respect to any and all claims . . . plaintiff may have against" Dikar. *Id.*; *see, e.g., Helicopteros*, 466 U.S. at 414 n.9. Specific jurisdiction exists only if plaintiff demonstrates that Dikar has enough contacts with Kentucky to satisfy due process requirements, the claims against Dikar "arise out of or relate to" those contacts, and the exercise of jurisdiction would be reasonable. *See, e.g., Helicopteros*, 466 U.S. at 414 n.8; *Kerry Steel*, 106 F.3d at 149.

A defendant is entitled to raise the defense of lack of personal jurisdiction through a motion to dismiss, supporting affidavits and evidence. *E.g., International Technologies*, 107 F.3d at 390. As stated in *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991), "in the face of a properly supported motion for dismissal, the plaintiff may not stand on

his pleadings but must by affidavit or otherwise set forth specific facts showing that the court has jurisdiction." The court has discretion to permit discovery limited to only the factual issues pertaining to personal jurisdiction. *Nationwide*, 91 F.3d at 792; *Theunissen*, 935 F.2d at 1458, 1465.

If the court does not permit discovery and no evidentiary hearing is held, the plaintiff must make a *prima facie* showing for the court's exercise of personal jurisdiction. *See, e.g.*, *International Technologies*, 107 F.3d at 391; *Kerry Steel*, 106 F.3d at 149. In other words, the court must "consider . . . whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Theunissen*, 935 F.2d at 1458.[1] Although the court must "view the affidavits, pleadings, and documentary evidence in the light most favorable to the plaintiff", a court is not required "to ignore undisputed factual representations of the defendant which are consistent with the representations of the plaintiff." *Kerry Steel*, 106 F.3d at 153.

If a plaintiff fails to satisfy the *prima facie* standard, the court is not required to hold an evidentiary hearing before dismissing the complaint. *Id.* at 154; *Market/Media Research, Inc. v. Union Tribune Publishing Co.*, 951 F.2d 102, 154 (6th Cir. 1991), *cert. denied*, 506 U.S. 824 (1992).

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[1]The Sixth Circuit has commented that it "arguably . . . has not expressly determined the appropriate burden of proof for cases in which the district court permits at least some discovery but does not conduct an evidentiary hearing before ruling on a Rule 12(b)(2) motion to dismiss." *Nationwide Mutual Ins. Co. v. Tryg International Ins. Co.*, 91 F.3d 790, 791 (6th Cir. 1996); *see also Conti v. Pneumatic Products Corp.*, 977 F.2d 978, 987 (6th Cir. 1992). Thus, the plaintiff may need to meet a higher burden of proof than the *prima facie* standard if some discovery is permitted, even if no evidentiary hearing is held.

If a *prima facie* showing *is* made, however, the court may determine that an evidentiary hearing is necessary: "[a] court may determine that in the circumstances of a particular case it is unfair to force an out-of-state defendant to incur the expense and burden of a trial on the merits in the local forum without first requiring more of the plaintiff than a *prima facie* showing of facts essential to *in personam* jurisdiction." *Boit*, 967 F.2d at 676; *see also Theunissen*, 935 F.2d at 144. For example, "when the proffered evidence is conflicting and the record is rife with contradictions, or when a plaintiff's affidavits are patently incredible," the court may hold an evidentiary hearing, "considering all relevant evidence proffered by the parties and making all factual findings essential to disposition of the motion." *Id.* (quotations and citations omitted); *see also Theunissen*, 935 F.2d at 1459 ("[T]he defendant who alleges facts to defeat jurisdiction has recourse to the court's discretionary authority to hold an evidentiary hearing if he disputes the plaintiff's factual assertions.") The evidentiary hearing is held "before the case reaches trial," with the court acting as fact finder under the "preponderance of the evidence" standard. *E.g., Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 145-46 (1st Cir. 1995).

Argument

PLAINTIFF CANNOT ESTABLISH THAT THE KENTUCKY LONG-ARM STATUTE AND THE DUE PROCESS CLAUSE PERMIT THIS COURT'S EXERCISE OF JURISDICTION OVER DIKAR

As discussed below, plaintiff cannot meet its burden of proving that this Court has personal jurisdiction over Dikar. Indeed, Dikar has no contacts whatsoever with Kentucky. Accordingly, the motion to dismiss should be granted because

this Court cannot, consistent with due process, exercise personal jurisdiction over Dikar in this case.

A. *The Court Does Not Have General Jurisdiction.*

As noted, a court has general jurisdiction over a nonresident defendant if the defendant has continuous, systematic and substantial connections with the forum state. *See, e.g., Helicopteros*, 466 U.S. at 414 n.9; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-49 (1952). Because the level of contacts required to establish general jurisdiction is high, courts rarely exercise personal jurisdiction on this basis. Even when a foreign corporation's contacts with the forum state are "quite extensive", courts have declined to find general jurisdiction over an out-of-state company unless it has "an office in the forum state" or some other substantial physical presence there. 16 James Wm. Moore, et al., *Moore's Federal Practice* § 108.41[3], at 108-49 through 108-50 (1997); *see, e.g., Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993) (noting that the court had "regularly . . . declined to find general jurisdiction even where the contacts were quite extensive").

For example, in *Helicopteros*, the Supreme Court of the United States held that a Texas court could not, consistent with due process, exercise general jurisdiction over a Colombian aviation services company notwithstanding that (i) the company's CEO had flown to Texas to negotiate a contract; (ii) the company purchased most of its helicopters from a helicopter manufacturer in Texas; (iii) the company had sent pilots and management personnel to Texas for training; and (iv) checks paying for the company's transportation services were drawn on a Texas bank. *See* 466

U.S. at 415-17. Along the same lines, in *Nationwide Mutual Insurance Co. v. Tryg International Insurance Co.*, 91 F.3d 790 (6th Cir. 1996), the Sixth Circuit rejected the plaintiff's claim that general jurisdiction existed notwithstanding that the foreign defendant had entered into prior contracts with companies in the forum state and had participated in an insurance pool with links to the forum state. *See id.* at 794. The *Nationwide* court found no "'continuous and systematic' business in . . . [the forum state] such as would render . . . [the defendant] generally amenable to suit in that state." *Id.*

Similarly, there is no evidence that Dikar has "continuous and systematic" contact with Kentucky. In fact, the evidence demonstrates that Dikar has *no contact at all* with Kentucky. As noted, Dikar does not have an office, factory, or any other place of business in the Commonwealth. No Dikar employee has ever visited Kentucky or engaged in any other contact with anyone there. Moreover, Dikar has never sold, advertised, marketed, promoted or distributed any product or service in the Commonwealth. In short, there is no link whatsoever between Dikar and Kentucky. Therefore, there can be no question that this Court lacks general jurisdiction over Dikar.

B. *The Court Does Not Have Specific Jurisdiction.*

Although the test for determining whether specific jurisdiction exists "must never be applied mechanically," the Sixth Circuit generally requires a plaintiff to demonstrate that the following three prerequisites are met in order to assert specific jurisdiction:

> "First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a

> consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable."

Kerry Steel, 106 F.3d at 150 (quoting *Southern Machinery Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968) ("*Mohasco*")); *Reynolds*, 23 F.3d at 1116. Plaintiff cannot demonstrate that any requirement is satisfied here.

1. The Purposeful Availment Requirement Is Not Met.

The "*sine qua non* for *in personam* jurisdiction," *Mohasco*, 401 F.2d at 381-82, is the requirement that the defendant "'purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). This factor "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random', fortuitous' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475.

The mere fact that a defendant foresaw that its product would be sold or used in the forum state is not enough, standing alone, for the purposeful availment requirement to be met. *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 295-97 (1980). Moreover, a plurality of the Supreme Court has determined that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi Metal Industry Co., Ltd. v. Superior Court*,

480 U.S. 102, 112 (1987) (plurality) ("*Asahi*"). According to the *Asahi* plurality, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum." *Id.*

In *Asahi*, the plurality determined that a California court did not have personal jurisdiction over a Taiwanese manufacturer for injury resulting from an allegedly defective tire tube purchased and used by the plaintiff in California. Over a five- year period, the Taiwanese manufacturer had produced and sold approximately 200,000 valve stem assemblies that were incorporated by another company into tire tubes sold in California, and the Taiwanese manufacturer "was fully aware that the valve stem assembles . . . would end up throughout the United States and in California." *Asahi*, 480 U.S. at 106; *see also id.* at 108. Nevertheless, the purposeful availment factor was not met because the defendant had not engaged in "[a]dditional conduct" to "indicate an intent or purpose to serve the market in the forum State." *Id.* Such additional conduct might include, for example,

> designing the product for the market in the forum state, advertising in the forum State, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.

Id. at 112. The *Asahi* plurality was particularly reluctant to find that the purposeful availment requirement had been met in light of the alien status of the defendant. *See id.*

The Kentucky Court of Appeals has adopted reasoning similar to the *Asahi* plurality in interpreting the limits of the Kentucky long-arm statute and due process with respect to a foreign defendant. In *Halderman v. Sanderson Forklifts Co.*, 818 S.W.2d 270 (Ky. Ct. App. 1991), the Kentucky Court of Appeals held that it lacked personal jurisdiction over an English manufacturer of a piece of equipment known as a Winget dumper, which allegedly was defective and caused injury in Kentucky. Central to the court's holding were that (i) the manufacturer had never sought "to directly distribute its products in Kentucky"; (ii) the manufacturer did not sell the equipment to the end user in Kentucky, but rather to an out-of-state distributor "to be distributed at . . . [the distributors'] discretion"; and (iii) the manufacturer had "had no contact with any person or entity in" Kentucky. *See id.* at 274. In light of these circumstances, the Kentucky Court of Appeals rejected the plaintiff's argument that personal jurisdiction existed merely by virtue of the defendant's act of placing the equipment in the stream of commerce by selling it to an out-of-state distributor. *Id.* Indeed, the Kentucky court specifically noted that the "stream of commerce" doctrine "was rejected by a plurality of the U.S. Supreme Court [in *Asahi*] in its consideration of the constitutional implications involved." *Id.* (citing *Asahi*).

Similarly, in several recent cases, the Sixth Circuit has rejected attempts to exercise personal jurisdiction over foreign companies that have no significant direct contact with the forum state. For example, in *International Technologies*, the Sixth Circuit affirmed the dismissal of an action against a Swiss company, finding that the purposeful availment requirement had not been met where (i) the contract at issue had been negotiated and executed in Europe; (ii) the Swiss company had never maintained an office in the forum state or

been qualified to do business there; (iii) the Swiss company's employees had visited the forum state only a few times; and (iv) the Swiss company had never designated an agent in the forum state to accept service of process. *See* 107 F.3d at 391. The *International Technologies* court noted the *Asahi* admonition to exercise restraint in assuming jurisdiction over foreign defendants. *See id.* at 388.

Also, in *Nationwide Mutual Insurance Co. v. Tryg International Insurance Co.*, 91 F.3d 790 (6th Cir. 1996), the Sixth Circuit affirmed the dismissal of an action against a Danish company for lack of personal jurisdiction. The court of appeals commented that "[s]pecial concerns arise when a plaintiff attempts to bring a foreign defendant within our national borders." *Id.* at 797. In concluding that the purposeful availment factor was not present, the Sixth Circuit noted that all of the negotiation and execution of the contract at issue took place overseas and that the Danish company had no subsidiaries or property in the forum state or anywhere else in the United States. *See id.* at 791, 796.

In other recent cases involving out-of-state companies, the Sixth Circuit has similarly held that the purposeful availment requirement was not met. *See Kerry Steel*, 106 F.3d 147 (affirming dismissal of action against out-of-state manufacturer where its only contacts with the forum state were faxes and telephone calls "to finalize the transaction" at issue); *Conti* 977 F.2d 978 (affirming dismissal of action against out-of-state company and its president); *Market/Media Research*, 951 F.2d 102 (affirming dismissal of action against out-of-state newspaper publisher and unincorporated operating division).

Courts in other jurisdictions have also refused to exercise jurisdiction over out-of-state manufacturers of products based merely upon those manufacturers' placement of products in the stream of commerce knowing that they might be sold or used in the forum state. For example, in *Boit*, the First Circuit affirmed the district court's holding that it lacked personal jurisdiction over the manufacturer of a hot air gun that caused property damage in the forum state. The only "contact" that the defendant manufacturer had with the forum state was that it sold the hot air gun to an out-of-state distributor, which in turn sold the gun through the mail to the contractor who used the gun in the forum state. *Id.* at 683. The court found

> no evidence that . . . [the manufacturer] designed the product in Maine, advertised in Maine, established channels for providing regular advice to customers in Maine, or marketed the product through a distributor who had agreed to serve as a sales agent in Maine.

Id. The absence of such evidence was critical to the First Circuit's decision that the district court "could not have constitutionally exercised personal jurisdiction" over the manufacturer, in light of the First Circuit's conclusion that "'mere awareness' that a product may end up in the forum state does not constitute 'purposeful availment.'" *Id.*

The First Circuit noted that the plaintiff "could not cite a single post-*Asahi* case holding that by placing a product into the stream of commerce with knowledge that the product could end up in the forum state a defendant purposefully establishes minimum contacts in that state." *Id.* at 683. Indeed, the First Circuit noted that several federal circuits had

adopted the reasoning of the *Asahi* plurality. *Id.* (citing, *inter alia*, *Madara v. Hall*, 916 F.2d 1510, 1516-17 (11th Cir. 1990); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990)).

The foregoing authorities establish as a matter of law that Dikar has not engaged in sufficient conduct to purposefully avail itself of acting within Kentucky. Dikar is a small Spanish cooperative operating in rural Spain with no ties to Kentucky. Like the foreign defendants in *Asahi*, *Halderman*, *International Technologies*, *Nationwide*, *Boit* and other cases where the U.S. court lacked personal jurisdiction, Dikar has never (i) sold, marketed, advertised or distributed any product or service in the forum state, (ii) owned any property in the forum state, or (iii) established any regular channel to service or have any other communications with customers in the forum state.

Dikar only manufactured the rifle, based on a design for general use throughout the United States, Canada and Europe. After Dikar sold the rifle to CVA in Spain, Dikar had no subsequent involvement in any resale to Gene Sears, Wal-Mart or plaintiff. Indeed, CVA had complete discretion to dispose of the rifle as it saw fit. Dikar did not exercise control over the rifle's distribution in the United States. At CVA's request, the rifle was distributed under the CVA name, with CVA listed as the manufacturer on the packaging, instructions and other accompanying materials. Dikar's name appears nowhere on these items. Furthermore, Dikar had no contact with any customer in Kentucky. CVA handled all customer inquiries, questions and complaints.

In sum, Dikar took no purposeful step to avail itself of the privilege of conducting business in Kentucky. Rather, it

simply manufactured the rifle at issue in Spain, sold it to CVA in Spain through a transaction initiated by CVA, and had no further involvement with respect to the rifle past the point of sale in Spain. Under *Asahi*, *Haldeman*, *International Technologies*, *Nationwide*, *Boit* and other cases, Dikar's activity falls far short of satisfying the purposeful availment requirement.

2. Plaintiff's Cause Of Action Does Not Arise From Any Of Dikar's Activities In Kentucky.

Plaintiff also cannot demonstrate that any of his claims arise from any activity of Dikar in Kentucky, the second prong of the *Mohasco* test. This factor requires "that the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities." *Kerry Steel*, 106 F. 3d at 152 (quotation omitted); *Mohasco*, 401 F.2d at 384 n.27, "The mere fact that the transaction" at issue "involved a . . . [Kentucky] party is obviously not sufficient" to satisfy this requirement. *Kerry Steel*, 106 F.3d at 152. Plaintiff cannot show that Dikar engaged in any Kentucky-related activity with a substantial connection to his claims. As previously explained, there is not *any* connection between the facts alleged in the amended complaint and any conduct of Dikar in Kentucky because Dikar has never had any contact with the Commonwealth.

3. It Would Be Unreasonable For The Court To Exercise Personal Jurisdiction Over Dikar.

The final requirement for exercising specific jurisdiction is a finding that it would not be unreasonable to do so. "[T]he exercise of personal jurisdiction must comport with 'traditional notions of fair play and substantial justice.'"

Reynolds, 23 F.3d at 1117 (quoting *Asahi*, 480 U.S. at 113). Because of Dikar's alien status, these reasonableness factors should be carefully considered here.

All of the Justices in *Asahi* recognized that, when the defendant resides or is based in a foreign country, concerns of reasonableness are heightened. The *Asahi* plurality cautioned lower courts to make "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case," guided by "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." 480 U.S. at 115. Even among the Justices who believed that the purposeful availment requirement had been satisfied in *Asahi*, there was consensus that the exercise of personal jurisdiction over the Taiwanese manufacturer would be unreasonable. *See CMMC v. Salinas*, 929 S.W.2d 435, 438 (Tex. 1996) ("[T]he Supreme Court was *unanimous* in holding that it was unfair to subject . . . [the Taiwanese manufacturer] to the jurisdiction of a California court.") (emphasis added).

As the *Asahi* plurality explained:

> [t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

480 U.S. at 114. Similarly, the Sixth Circuit observed that "[s]pecial concerns arise when a plaintiff attempts to bring a foreign defendant within our national borders." *Nationwide*, 91 F.3d at 797.

These concerns clearly counsel against this Court's exercise of jurisdiction over Dikar. "A manufacturer cannot fairly be expected to litigate in every part of the world where its products may end up." *CMMC*, 929 S.W.2d at 439. If tribunals in foreign countries followed the same logic that would subject Dikar to the jurisdiction of this Court, then a company in rural Kentucky would be subject to suit wherever around the globe that its products and services were sold, no matter how remote.

Because Spain is a foreign sovereign, "its interests merit particular respect in our courts." *International Technologies*, 107 F.3d at 394. Because Dikar through its activities in Spain did not purposefully avail itself of the privilege of conducting business in Kentucky, Dikar's rights and duties vis-a-vis plaintiff should not be determined by a court in Kentucky. Moreover, plaintiff cannot demonstrate that the courts of Spain have been unavailable to him to pursue a claim against Dikar. *Cf. Nationwide*, 91 F.3d at 797 (affirming dismissal for lack of personal jurisdiction over Danish defendant where the court saw "no reason to suspect that . . . [the plaintiff] cannot travel to . . . Denmark and, if merited, obtain compensation for injuries arising out of" the defendant's allegedly wrongful conduct). Accordingly, none of the prerequisites for exercising specific jurisdiction are met in this case.[2]

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[2]Even if the Kentucky long-arm statute and due process permitted the exercise of personal jurisdiction in this case, the motion to dismiss should be granted because the Commerce Clause of the U.S. Constitution precludes the application of Kentucky law to Dikar in the particular circumstances here. Both the Supreme Court of the United States and the Sixth Circuit have recognized that "the assumption of jurisdiction over foreign corporations could in some cases violate the Commerce Clause." *Mohasco*, 401 F.2d at 377 n.6; *see, e.g., Davis v. Farmers' Co-operative*

Conclusion

For the foregoing reasons, the amended complaint against Dikar should be dismissed with prejudice.

[Signature Block and Certificate of Service omitted]

Equity Co., 262 U.S. 312, 317-18 (1923).

The Commerce Clause provides, in pertinent part, that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. 1, § 8, cl. 3. "[T]he Commerce Clause . . . not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but it also effected a curtailment of state power" even in the absence of federal legislation. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 117 S. Ct. 1590, 1596 (1997). Accordingly, "the Commerce Clause reinforces the Due Process Clause and serves as an independent restraint on long-arm jurisdiction in some circumstances," *Jadair v. Walt Keeler Co.*, 679 F.2d 131, 134 n.11 (7th Cir. 1982), imposing higher standards that a plaintiff must meet than those under the Due Process Clause, *Scanapico v. Richmond, Fredericksburg & Potomac RR Co.*, 439 F.2d at 26. For example, even where a nonresident defendant engaged in solicitation in the forum state, the Commerce Clause may preclude the exercise of personal jurisdiction in some cases. *See Mohasco*, 401 F.2d at 378 n.6.

As plaintiff has brought no federal claims against Dikar, this Court sitting in diversity is acting only to enforce state law. Given these circumstances, this Court's exercise of jurisdiction is subject to review under the Commerce Clause. The assumption of jurisdiction over Dikar in this case based on commercial activities that occurred entirely in Spain impermissibly intrudes on the exclusive power of Congress under the Commerce Clause to regulate foreign commerce.

APPENDIX O

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CIVIL ACTION NO. 97-28

MATTHEW HAYMAKER — PLAINTIFF

V.

CONNECTICUT VALLEY ARMS;
WAL-MART STORES, INC.;
DIKAR S. COOP. LTDA; and
GENE SEARS SUPPLY CO. — DEFENDANTS

PLAINTIFF'S RESPONSE TO DIKAR'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR LEAVE TO TAKE ADDITIONAL DISCOVERY

[Filed August 15, 1997]

I. INTRODUCTION

Defendant Dikar, S. Coop. LTDA. (hereafter "Dikar") has filed its Motion to Dismiss Plaintiff's Amended Complaint, supported by affidavits. Plaintiff would show to the Court that the motion should not be granted for two reasons:

i. The facts, even as recited by Dikar, do not entitle it to be dismissed based on lack of personal jurisdiction; and

ii. The motion is premature, since Plaintiff has had no opportunity to conduct discovery concerning the jurisdictional issues, from Dikar or other defendants with knowledge.

A. SUMMARY OF FACTS

On September 26, 1996, Matt Haymaker purchased a muzzle loading rifle from the Richmond, Kentucky, Wal-Mart store. The rifle was a Connecticut Valley Arms (hereafter "CVA") .50-caliber "Buckmaster" inline muzzle-loading rifle, which cost $214.96. It was a birthday gift from his parents. At the time, Matt was 22 years old and a student at Eastern Kentucky University.

On October 1, 1996, Matt was firing the rifle for the first time. He was accompanied by a friend to a target range, and they alternated shots while setting the sights on the rifle. On approximately the ninth shot, the rear end of the gun barrel exploded in Matt's fact, and he suffered catastrophic injuries. He was treated at the U.K. Medical Center. The operative report describes the following injuries:

1. Ruptured globe of the right eye with corneoscleral laceration;

2. Facial lacerations;

3. Orbital and maxillary sinus fractures.

Matt has suffered severe permanent damages including the loss of sight in his right eye.

An illustration of the rifle is attached as *Exhibit "A."*

B. SUMMARY OF THE LITIGATION

On December 27, 1996, a lawsuit was filed against CVA and Wal-Mart in the Scott Circuit Court. On January 28, 1997, the Defendants removed the case to the U.S. District Court, Eastern District of Kentucky.

On February 13, 1997, the Court ordered counsel for the parties to conduct a meeting as required by Rule 26(f) and to file a written Joint Report no later than March 24, 1997.

In the meantime, CVA served its Answer to Plaintiff's Interrogatories in which it stated that it was not the manufacturer of the "muzzle loader" in question. Since it was not the manufacturer, CVA took the position that it was not required to produce blueprints, diagrams, or any testing documents.

On March 19, 1997, Plaintiff moved to file an Amended Complaint adding the following additional parties:

1. Dikar, S. Coop. LTDA., Urarte Kalea 26, Poligono Industrial San Lorenzo, 20570 Bergara, Spain; manufacturer of the rifle.

2. Gene Sears Supply Co., P.O. Box 38, El Reno, Oklahoma 73036; supplier of the rifle to Wal-Mart.

The information pertaining to the manufacturer and supplier was provided by counsel for the other Defendants by letter of March 10, 1997. See *Exhibit "B."*

On March 18, 1997, counsel for Plaintiff and counsel for CVA and Wal-Mart filed a "Joint Motion for Extension of

Time" to comply with FRCP 26(f). The basis for the motion was the need to serve the additional Defendants, one of which required service under the Hague Convention. This motion was sustained by the Court's Order of March 26, 1997.

On July 30, 1997, Defendant, Dikar filed it Motion to Dismiss the Amended Complaint on the ground that the Court lacks personal jurisdiction. Absolutely no discovery has been taken from Dikar, or from the other parties concerning their relationship with Dikar.

On August 5, 1997, the Court directed all parties to conduct a meeting pursuant to Rule 26(f) and to file a written report no later than September 15, 1997.

Only one deposition has been taken by any party in this case. This was a deposition of Neill Stevens, Vice President of a claims adjusting service retained by CVA. A copy is attached as *Exhibit "C."* Mr. Stevens was deposed by the Plaintiff on July 14, 1997, concerning his knowledge of Matt Haymaker's case and his knowledge of other similar occurrences. In the course of his deposition, Mr. Stevens disclosed thirteen other incidents which involved the following similarities:

1. They all involved a similar .50 caliber in-line muzzle loading rifle;

2. They all involved rifles that were new or relatively new;

3. They all involved barrel explosions which resulted in injuries to the user, many involving serious eye damage;

4. All of the other incidents occurred between September 1996 and December 1996;

5. Four of these other incidents occurred in Kentucky, three in Ohio, two in Virginia, two in Tennessee, one in Louisiana, and one in Michigan.

In Attachment 2 to its Motion, Dikar submitted a bill of lading indicating that Matt's Buckmaster rifle was one of a shipment of 398 identical rifles, along with other rifles, sent to CVA in the United States.

II. ARGUMENTS

A. *DISMISSAL OF DIKAR WOULD VIOLATE DUE PROCESS, AND WOULD BE GROSSLY UNFAIR TO THE PLAINTIFF*

The pertinent long-arm status is K.R.S. 454.210, which permits the Court to exercise jurisdiction over Dikar so long as the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution are satisfied.

In order to satisfy the requirements of the Due Process Clause, the Sixth Circuit has established three elements which must be met. Those include:

> First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant must have a substantial enough connection with the forum state to

make the exercise of jurisdiction over the defendant reasonable.

Kerry Steel, Inc. v. Paragon Industries, Inc., 106 F.3d 147, 150 (6th Cir. 1997) (quoting *Southern Machinery Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968)).

1. *Dikar Purposely Availed Itself of Access to Kentucky's Markets*

The first issue is whether or not Dikar purposely availed itself of the privilege of acting in the forum state or causing a consequence in the forum state. In *Poyner v. Erma Werke GMBH et al.*, 618 F.2d 1186 (6th Cir. 1990). *cert. denied*, 449 U.S. 841 (1980), the Defendant, a German gun manufacturer, utilized the services of an American based distributor. The Sixth Circuit held that "The use of an independent distributor so that the manufacturer is only indirectly responsible for the product reaching an injured consumer, in and of itself, will not insulate a non-resident foreign corporation from suit." *Id.* at 1190 (citing *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969)).

There is a difference in the parties' interpretation of applicable cases. First, Dikar relies on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) to argue that foreseeability of a product's sale in a forum is not enough, standing alone, to satisfy the purposeful availment requirement. However, in *World-Wide Volkswagen Corp.*, this requirement of additional contact was met because the defendant benefitted continually from what he knew to be sales of his product by merchants in the forum state. Likewise, Dikar placed this exploding rifle (and other exploding rifles) into the stream of commerce in this country, without regard for the ultimate

location of sale, and it profited from the sales of this rifle and others like it in the Commonwealth of Kentucky.

Dikar also relies on *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987) for the proposition that the placement of a product into the stream of commerce, without more, is not enough to satisfy this due process. It should be pointed out that personal jurisdiction over the defendant in *Asahi* was denied on other grounds than purposeful availment. *Id.* at 102. On that non-dispositive issue, four members of the Court concluded that jurisdiction premised on the placement of a product into the stream of commerce, with knowledge of marketing but without a showing of additional conduct, *is consistent* with the Due Process Clause. *Id.* at 104. Plaintiff also believes, and has asked leave to conduct discovery to show, that there are additional jurisdictional contacts between Dikar and the forum.

In addition, Dikar cites *Halderman v. Sanderson Forklifts Co.*, 818 S.W.2d 270, 274 (Ky. App. 1991) in support of its argument that this purposeful availment element has not been met. However, *Halderman* is easily distinguishable from the case at hand. The product in *Halderman*, a Winget dumper, was sold in Ohio and was never even distributed in Kentucky. "It was merely fortuitous that one Winget dumper ended up in Kentucky." *Id.* Here, it was *not* merely fortuitous that Matt Haymaker's exploding rifle ended up in Kentucky. The rifles were and continue to be regularly sold in retail stores in Kentucky.

None of the remaining Sixth Circuit cases relied upon by Dikar are products liability cases. That fact alone is enough to distinguish those from the case at hand. *International Technologies Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386

(6th Cir. 1997) involved conversion of intellectual property and misappropriation of trade secrets. *Conti v. Pneumatic Products Corp.*, 977 F.2d 978 (6th Cir. 1992) involved fraud and misrepresentation. Finally, *Nationwide Mutual Ins. Co. v. Tryg International Ins. Co.*, 91 F.3d 790 (6th Cir. 1996); *Kerry Steel*, 106 F.3d 147; and *Market/Media Research Inc. v. Union Tribune Publishing Co.*, 951 F.2d 102 (6th Cir. 1991), *cert. denied*, 506 U.S. 824 (1992) all involved a breach of contract.

The record reveals that Dikar manufactured hundreds of firearms for an American distributor, CVA, *with the intention* that the guns would be used in the U.S. and *with knowledge* that they would be sold in retail outlets throughout this country. Dikar placed no restrictions or limitations on CVA's distribution. Moreover, CVA is the only company that distributes Dikar manufactured sporting guns in the U.S. Matt's case is not an isolated occurrence, nor did this rifle end up in Kentucky fortuitously. The sale of this rifle, and others similar to it, arose from an effort to serve the U.S. market, including Kentucky. Based upon the foregoing, Dikar's activities satisfy the necessary purposeful availment requirement.

2. *Plaintiff's Cause of Action Arises from Dikar's Activities in Kentucky*

This element requires that Matt's claim have a substantial connection with Dikar's in-state activities. *Kerry Steel, Inc.*, *supra*, 106 F.3d at 152; *Southern Machinery Co.*, *supra*, 401 F.2d 374. Plaintiff previously demonstrated Dikar's connection with Kentucky. Dikar's sale of hundreds of rifles to CVA with no restriction as to the area where they would be distributed in the U.S., coupled with Dikar's substantial profit on the sales of these rifles in Kentucky, as well as the subsequent Kentucky

explosion of several rifles resulting in injuries, is sufficient to satisfy this requirement. Matt's claim, based on his injuries sustained, is directly related to Dikar's activity, the manufacture of exploding rifles distributed and sold in Kentucky.

3. *It Would be Reasonable for this Court to Exercise Personal Jurisdiction Over Dikar*

Finally, the question is whether or not the exercise of jurisdiction over Dikar would be reasonable. In its brief, Dikar pointed out that the *Asahi* plurality cautioned lower courts to make "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case," guided by "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state." 480 U.S. at 115. This involves three inquiries.

The first inquiry is whether it is reasonable, from Dikar's perspective, to exercise jurisdiction over it. Dikar should have anticipated being haled into court in Kentucky. Dikar manufactured hundreds of firearms for an American distributor, CVA, with the intention that the guns would be used in the U.S. and with knowledge that they would be sold in retail outlets throughout this country. Dikar placed no restrictions on CVA's distribution in the U.S. Moreover, CVA is the only company that distributes Dikar manufactured sporting guns in the U.S. This is not an isolated occurrence, nor did this rifle end up in Kentucky fortuitously. The sale of this exploding rifle, and others similar to it, arose from an effort to serve the U.S. market, including Kentucky. Under these circumstances, it is unjust to permit Dikar to plead ignorance as to where the

guns were actually sold and escape the jurisdiction of this Court.

Second, the forum's interest in adjudicating the dispute is another factor to be considered. *Asahi Metal Industry Co., Ltd., supra,* 480 U.S. at 115; *Poyner, supra,* 618 F.2d at 1192. Claims based on injuries caused by inherently dangerous products imported through independent distributors fall within that class of litigation which the forum state has a deep interest in adjudicating. *Poyner, supra,* 618 F.2d at 1192. Kentucky's interest in adjudicating this dispute is heightened by the fact that there are four other cases in Kentucky identical to the one at hand. Additionally, Kentucky has a manifest interest in protecting its residents from distant, possibly harassing litigation, particularly when, as here, the injury took place in Kentucky and the product was distributed and sold in Kentucky.

Finally, the plaintiff's interest in obtaining convenient and effective relief is a relevant factor to be considered in determining the reasonableness of requiring a nonresident defendant to litigate a claim in the forum state. *Asahi Metal Industry Co., Ltd., supra,* 480 U.S. at 115; *World-Wide Volkswagen Corp, supra,* 444 U.S. at 292. When a foreign corporation such as Dikar places goods into the stream of commerce for distribution throughout the U.S. and it derives substantial revenue from the distribution of same, it is reasonable that claims emanating from injuries caused by the defective product be litigated where the sale occurred and the injured victim is found. Otherwise, the other thirteen victims injured by these exploding rifles, like Matt, would have no recourse to justice anywhere in the United States. It is not as if the alternative forums here are Ohio or New York or

California; rather, there would be *no* alternative U.S. forum. This is fundamentally unfair and unjust.

It is clear that Matt Haymaker and the Commonwealth of Kentucky, as well as the other injured victims in this state, have a significant interest in having this dispute litigated in Kentucky. Their interest substantially outweighs any burden which may be imposed on Dikar.

B. *PLAINTIFF IS ENTITLED TO DISCOVERY AS IT RELATES TO THE JURISDICTIONAL ISSUE*

It is clear that Dikar's motion is in reality one for summary judgment, since it relies on the tendered affidavits of Dikar representatives as to its activities in making, selling, advertising and marketing this and other firearms. The "motion to dismiss" must therefore be decided under the principles relating to summary judgments, found in F.R.C.P. 56. One of these principles is that a party is not entitled to summary judgment until the opposing party has had a reasonable opportunity to discover the relevant facts as to the issues in question. *Vance v. U.S.*, 90 F.3d 1145, 1148 (6th Cir. 1996) (citing *Whites Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-232 (6th Cir. 1994)) held that:

> If the non-movant makes a proposed timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion.

There has been no opportunity for discovery here, since discovery must follow the initial meeting of the parties. The Court has just issued its Order for the initial meeting including

the new parties Dikar and Gene Sears Supply Company, which must be held by September 5, 1997. Plaintiff must have an opportunity for reasonable discovery from Dikar and from other parties, such as CVA, which had dealings with Dikar or which have knowledge of Dikar's activities. Such discovery has not yet been done and could not be done in the absence of Dikar as a party.

Plaintiff must have the right to discover, from both Dikar and CVA, (a) the documents, including correspondence and agreements, surrounding the sale of this rifle, (b) the discussions between the parties, (c) the activities of Dikar to market its products in the world market, including its admitted intent that this rifle be used in the United States, (d) the manner in which Dikar came to CVA's attention, (e) the nature of any exclusive rights by CVA to market Dikar's rifles in this country, and (f) Dikar's knowledge of the marketing and sales of this rifle in the U.S.

Plaintiff hereby moves for leave to conduct this additional critical discovery. This Court should grant Plaintiff's motion for additional discovery and permit the discovery to proceed before any motion for summary judgment pursuant to F.R.C.P. 56 is considered. Dikar may wish to renew its motion on jurisdictional grounds at the completion of the discovery.

III. CONCLUSION

Dikar's claim that this Court lacks jurisdiction would completely frustrate the intent of the Kentucky Long Arm Statute, and would leave Matt Haymaker without any practical resource against the maker of the exploding rifle which mangled his face and eye. Such a decision would also be a blow to the thirteen other consumers injured since September

1996, and to others injured in the future. Nothing could be more unfair than for Dikar to make this exploding rifle for sale in the U.S., to reap the profits from its sale as intended in numerous states, and to avoid the consequences when its rifles maim the consumers. In addition, Dikar wants to unfairly deprive the Plaintiff of any right to discover the facts to show that Dikar is subject to jurisdiction.

Based upon the foregoing reasons, the "motion to dismiss" filed by Dikar should be denied. Such dismissal would preclude Dikar from being amenable to suit anywhere in the United States.

In addition, the Court should grant Plaintiff's motion to conduct discovery from Dikar as it relates to the jurisdictional issue.

Respectfully submitted,

PETER PERLMAN LAW
OFFICES, P.S.C.
388 SOUTH BROADWAY
LEXINGTON, KENTUCKY 40508
TELEPHONE: (606) 253-3919

/s/ Peter Perlman
ATTORNEY FOR PLAINTIFF

[Certificate of Service Omitted]

APPENDIX P

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

MATTHEW HAYMAKER,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 97-28
CONNECTICUT VALLEY ARMS, WAL-MART STORES, INC., DIKAR, S. COOP. LTDA., AND GENE SEARS SUPPLY CO.,	)	
Defendants.	)	

RESPONSES AND OBJECTIONS OF DEFENDANT DIKAR, S. COOP. LTDA. TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

[Filed November 7, 1997]

Defendant Dikar, S. Coop. LTDA. ("Dikar"), without prejudice to its position that this Court lacks personal

jurisdiction over Dikar and without prejudice to Dikar's rights under the laws of Spain generally and Article 24.1 of the Spanish Constitution in particular, submits the following responses and objections to plaintiff's first set of requests for production of documents:

GENERAL RESPONSES AND OBJECTIONS

Dikar incorporates the following general responses and objections into each and every one of the specific responses and objections set forth below.

1. Dikar objects to each and every document request insofar as it seeks any information not relevant to the personal jurisdiction issues or reasonably calculated to lead to the discovery of admissible evidence related to such issues. Until the Court holds that it has personal jurisdiction over Dikar, any and all discovery relating to non-jurisdictional issues can proceed only pursuant to the procedures established for the taking of evidence in Spain under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

2. Dikar also objects to each and every document request insofar as its seeks any document created on or after the date when plaintiff filed his complaint. If plaintiff believes that a particular category of post-complaint non-privileged documents is relevant to the personal jurisdiction issues or reasonably calculated to lead to the discovery of admissible evidence related to such issues, Dikar will consider any request for such documents and respond appropriately.

3. Dikar further objects to each and every document request insofar as it seeks any document that constitutes trial preparation material or attorneys' work product, discloses the substance of an attorney-client communication, or is otherwise privileged.

4. If Dikar produces documents that fall within the purview of objections specifically stated herein or elsewhere, such production should not be deemed a waiver of these objections, and Dikar expressly reserves each and every such objection. If Dikar inadvertently produces any document protected by the attorney-client privilege or the attorney work-product doctrine, or any other privilege, such production shall not be deemed to be a waiver of privilege. Dikar shall be entitled to the return of any and all such inadvertently produced privileged documents, including all copies thereof.

5. Subject to the objections and conditions set forth in this response, Dikar will make available for inspection and copying at a mutually convenient time the documents described below that Dikar has agreed to produce.

SPECIFIC RESPONSES AND OBJECTIONS
TO REQUESTS FOR PRODUCTION OF DOCUMENTS

Document Request No. 1:

Produce all specifications and requirements from Defendant C.V.A. to the Defendant Dikar for this rifle.

Response:

Dikar objects to Document Request No. 1 on the ground that the phrase "specifications and requirements" is unduly vague and ambiguous. Subject to and without waiver of the foregoing objection, Dikar will produce the specification sheet (numbered DHK1) that Dikar relied upon to produce the rifle bearing the serial number 61-13-031146-96.

Document Request No. 2:

Produce all documents, including correspondence and agreements, surrounding the sale of this rifle; other rifle sales to Defendant CVA; and other rifle sales to U.S. entities.

Response:

Dikar objects to Document Request No. 2 on the grounds that (i) the term "surrounding" is unduly vague and ambiguous; (ii) the request seeks documents containing confidential business and proprietary information; and (iii) information regarding sales of rifles to non-Kentucky residents is neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence relevant to such issues. Subject to and without waiver of the foregoing objections, Dikar will produce (i) all non-privileged documents that Dikar has been able to locate in its possession, custody or control specifically relating to the shipment of guns from Dikar to CVA that included a rifle bearing serial number 61-13-031146-96; and (ii) upon entry of a sharing order or protective order, all invoices, bills of lading and Spanish customs documents that

Dikar has been able to locate in its possession, custody or control relating to any other rifle sale to any U.S. entity from January 1993 through the date of the filing of the complaint. Documents responsive to Document Request No. 2 have been numbered DHK2 - DHK644.

Document Request No. 3:

Produce all blueprints, diagrams or other documents which show the design specifications of this rifle, including all material specifications for the barrel.

Response:

Dikar objects to Document Request No. 3 on the grounds that (i) the terms "design specifications" and "material specifications" are unduly vague and ambiguous; (ii) the request seeks documents that are protected by the attorney-client privilege, attorney work product doctrine or other privilege; (iii) the request seeks information that is neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence relevant to such issues; and (iv) the request seeks documents that contain confidential business and proprietary information.

Document Request No. 4:

Produce all documents pertaining to any testing of this rifle, including any testing of the barrel.

Response:

Dikar objects to Document Request No. 4 on the ground that it seeks information that is neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence relevant to such issues.

Document Request No. 5:

Produce a copy of any instruction manual and other documents provided by Defendant Dikar to Defendant CVA or other purchasers of this rifle.

Response:

Dikar objects to Document Request No. 5 on the ground that the phrase "other documents" is (i) unduly vague and ambiguous, and (ii) unduly burdensome and oppressive and seeks confidential business and proprietary information in that it arguably calls for Dikar to produce each and every document ever provided by Dikar to CVA. Subject to and without waiver of the foregoing objections, Dikar states that it is not aware of having provided to CVA or any other entity or person in the United States any instruction manual or other document with instructions for retail consumer use of the rifle model at issue in this litigation.

Document Request No. 6:

Produce all documents pertaining to non-lawsuit customer complaints, or any reports of injury, concerning any muzzle-loading rifle.

Response:

Dikar objects to Document Request No. 6 on the grounds that (i) the phrase "non-lawsuit customer complaints, or any reports of injury" is unduly vague and ambiguous; (ii) the request seeks trial preparation material and documents that are protected by the attorney-client privilege, the work-product doctrine and other privileges; (iii) the request seeks information that is neither relevant to the lawsuit nor reasonably calculated to lead to the discovery of admissible evidence; and (iv) the request seeks information that is neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence related to such issues.

Document Request No. 7:

Produce all documents pertaining to lawsuits which have been brought against Defendant Dikar alleging a defect in the design or construction of any Dikar muzzle-loading rifle.

Response:

Dikar objects to Document Request No. 7 on the grounds that (i) the request seeks documents that are neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence related to such issues; (ii) the phrase "all documents pertaining to lawsuits" is unduly vague and ambiguous; (iii) the request calls for a legal opinion, and thus disclosure of attorney work product, regarding the allegations of pleadings; (iv) the request seeks documents that are neither relevant to this lawsuit nor reasonably calculated to lead to

the discovery of admissible evidence; (v) the request seeks trial preparation material and documents that are protected by the attorney-client privilege, the work-product doctrine and other privileges; and (vi) the request seeks publicly available information.

Document Request No. 8:

Produce copies of all advertising and promotional materials, whether print, audio, video or other format, used by Defendant Dikar to promote the sale of any muzzle-loading rifle.

Response:

Dikar objects to Document Request No. 8 on the grounds that (i) the phrases "advertising and promotional material" and "used by Defendant Dikar to promote the sale" are unduly vague and ambiguous; (ii) any advertising or promotion of the sale of Dikar's products in jurisdictions other than Kentucky is neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence related to such issues; and (iii) any advertising or promotion of the sale of Dikar's products in jurisdictions other than Kentucky is neither relevant to this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing objections, Dikar states that it has located no documents, audiotapes or videotapes in its possession, custody or control that have been used by Dikar to advertise or promote any muzzle-loading rifle in the United States.

Document Request No. 9:

Produce copies of any correspondence with any governmental agency concerning the safety of this muzzle-loading rifle.

Response:

Dikar objects to Document Request No. 9 on the ground that correspondence with governmental agencies in countries other than the United States is neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence relevant to such issues. Subject to and without waiver of the foregoing objections, Dikar states that it has no correspondence with any state or federal governmental agency in the United States concerning the safety of any muzzle-loading rifle.

Document Request No. 10:

Produce all of the documents, including correspondence and agreements, surrounding the distribution of rifles manufactured by Defendant Dikar which were purchased by Defendant CVA.

Response:

Dikar objects to Document Request No. 10 on the grounds that (i) the terms "surrounding" and "distribution" are vague and ambiguous; (ii) the request seeks documents containing confidential business and proprietary information; (iii) if read broadly, the request is unduly burdensome and oppressive; (iv) the request is unlimited in scope of time; and (v) the request seeks information that is neither relevant to

this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing objections, Dikar will produce all pre-complaint documents of the following type that have been located in Dikar's possession, custody or control: CVA catalogues, publications containing advertisements of CVA products, and official directories of annual hunting shows of the National Association of Sporting Goods Sales. Documents falling into these categories are numbered DHK645 - DHK1057. Also subject to and without waiver of the foregoing objections, Dikar will produce the following documents (numbered DHK1058 - DHK1611) upon entry of a sharing order or protective order attached hereto: Survey On The U.S.A. Market For Muzzle Loading Arms; Assessment of Dikar/CVA Weapons In The United States Of America; Estudio De Armas De Avancarga En Los Estados Unidos Para Dikar/CVA; Estudio Del Mercado De Armas De Avancarga En U.S.A. Para Dikar, S. Coop; agreements between CVA and Dikar dated May 24, 1984, December 1, 1985, October 1990, October 1, 1991, and October 1, 1992; and CVA Salesman's Handbooks for 1995 and 1996.

Document Request No. 11:

Produce all of the documents between all Defendants concerning their dealings with Defendant Dikar.

Response:

Dikar objects to Document Request No. 11 on the grounds that (i) it is unduly vague and ambiguous; (ii) it seeks confidential business and proprietary information; and (iii) documents that relate to the sale or distribution of products that were never purchased by any person or entity

in Kentucky are neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence related to such issues.

Document Request No. 12:

Produce an organizational chart of Defendant Dikar, including a listing of officials and titles.

Response:

Dikar will produce an organizational chart, numbered DHK1612 - DHK1613 in response to Document Request No. 12.

Document Request No. 13:

Produce all documents pertaining to proceeds generated from sales of firearms to Defendant CVA, and all other U.S. purchasers.

Response:

Dikar objects to Document Request No. 13 on the grounds that (i) the phrase "proceeds generated from sales" is unduly vague and ambiguous, and (ii) the request seeks documents containing confidential business and proprietary information. Subject to and without waiver of the foregoing objections, Dikar will produce, upon entry of the protective attached hereto, all invoices that it has been able to locate in its possession, custody or control relating to Dikar's sales of

firearms to any U.S. purchaser from January 1993 through the date when plaintiff filed his complaint. The invoices are part of the group of documents numbered DHK2 - DHK644.

[Signature Block and Certificate of Service omitted]

APPENDIX Q

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

MATTHEW HAYMAKER,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 97-28
CONNECTICUT VALLEY ARMS, WAL-MART STORES, INC., DIKAR, S. COOP. LTDA., AND GENE SEARS SUPPLY CO.,	)	
Defendants.	)	

ANSWERS AND OBJECTIONS OF DEFENDANT DIKAR, S. COOP. LTDA. TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

[Filed November 7, 1997]

Defendant Dikar, S. Coop. LTDA. ("Dikar"), without prejudice to its position that this Court lacks personal

jurisdiction over Dikar and without prejudice to Dikar's rights under the laws of Spain generally and Article 24.1 of the Spanish Constitution in particular, submits the following answers and objections to plaintiff's first set of interrogatories:

GENERAL ANSWERS AND OBJECTIONS

Dikar incorporates the following general objections into each and every one of the specific answers and objections set forth below.

1. Dikar objects to each and every interrogatory insofar as it seeks any information not relevant to the personal jurisdiction issues or reasonably calculated to lead to the discovery of admissible evidence related to such issues. Until the Court holds that it has personal jurisdiction over Dikar, any and all discovery relating to non-jurisdictional issues can proceed only pursuant to the procedures established for the taking of evidence in Spain under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

2. Dikar also objects to each and every interrogatory insofar as it seeks any information regarding events that occurred on or after the date when plaintiff filed his complaint. If plaintiff believes that a particular category of post-complaint non-privileged information is relevant to the personal jurisdiction issues or reasonably calculated to lead to the discovery of admissible evidence related to such issues, Dikar will consider any request for such information and respond appropriately.

3. Dikar further objects to each and every interrogatory insofar as it seeks any information that constitutes trial preparation material or attorneys' work product, discloses the substance of an attorney-client communication, or is otherwise privileged.

4. If Dikar discloses information that falls within the purview of objections specifically stated herein or elsewhere, such disclosure should not be deemed a waiver of these objections, and Dikar expressly reserves each and every such objection.

SPECIFIC ANSWERS AND OBJECTIONS TO INTERROGATORIES

Interrogatory No. 1:

Identify the person responding on behalf of Defendant Dikar.

Answer:

Jon Muniategui.

Interrogatory No. 2:

State whether the Defendant Dikar was the manufacturer of an in-line muzzle-loader .50-caliber rifle, Serial Number 61-13-031146-96, and state the years during which such rifle model was manufactured by Defendant Dikar.

Answer:

Dikar produced an in-line, muzzle-loader .50-caliber rifle bearing the serial number 61-13-031146-96, and is aware that plaintiff alleges that he purchased a rifle fitting this description and bearing the name of Connecticut Valley Arms, Inc. ("CVA") as manufacturer. Dikar is without knowledge of whether the rifle purchased by plaintiff was in the same condition that the rifle fitting the above description was in when it left Dikar's possession. The model of the rifle fitting the above description has been produced by Dikar in various designs since 1996.

Interrogatory No. 3:

Identify all lawsuits which have been brought against Defendant Dikar alleging a defect in the design or construction of any Dikar's [sic] muzzle-loading rifle, including: court, civil action number, style of action, present status, and name, address, and phone number of the plaintiff's attorney.

Answer:

Dikar objects to Interrogatory No. 3 on the ground that it requests information that is neither relevant to the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence relevant to such issues. Dikar also objects to Interrogatory No. 3 on the grounds that it (i) requests information that is publicly available; (ii) requests a legal opinion, and hence attorney work product, regarding the allegations of pleadings; and (iii)

is unduly vague and ambiguous in its request for the "present status" of lawsuits.

Interrogatory No. 4:

Identify all non-lawsuit customer complaints, or any reports of injury, arising from the use of a Dikar muzzle-loading rifle.

Answer:

Dikar objects to Interrogatory No. 4 on the grounds that (i) the phrase "non-lawsuit customer complaints, or any reports of injury" is unduly vague and ambiguous; (ii) the interrogatory seeks certain information that is protected from disclosure by privileges applicable to trial preparation material, attorney work product and attorney-client communications; and (iii) the interrogatory seeks information that is neither relevant to the lawsuit nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing objections, Dikar states that it has never had any communication with any retail customer in Kentucky or any other jurisdiction in the United States who complained about or reported any injury arising from the use of a Dikar muzzle-loading rifle.

Interrogatory No. 5:

State the number of rifles purchased by Defendant CVA, and all other U.S. purchasers, from Defendant Dikar.

Answer:

Dikar objects to Interrogatory No. 5 on the ground that it is unlimited in scope of time, calling for information dating back approximately eighteen years, when CVA made its first purchase of rifles from Dikar. Because of the broad period of time involved, all of the information necessary to answer Interrogatory No. 5 is neither within the personal knowledge of Dikar's employees nor ascertainable from the relevant documents in Dikar's possession, which date back to January 1993. Subject to and without waiver of the foregoing objections, Dikar will produce all invoices from January 1993 through the date of the complaint that it has located within its possession, custody or control from which plaintiff can calculate the approximate total number of rifles shipped to U.S. purchasers during that period. Because the burden of deriving or ascertaining such information is substantially the same for plaintiff as for Dikar, these invoices will be produced by Dikar pursuant to Fed. R. Civ. P. 33(d) in the group of documents numbered DHK2 - DHK644.

Interrogatory No. 6:

State Defendant Dikar's proceeds generated from sales of firearms to Defendant CVA, and all other U.S. purchasers.

Answer:

Dikar objects to Interrogatory No. 6 on the ground that the term "proceeds" is unduly vague and ambiguous. Dikar also objects to Interrogatory No. 6 on the ground that it is unlimited in scope of time, calling for information dating back approximately eighteen years, when CVA made its first purchase of rifles from Dikar. Because of the broad period of time involved, all of the information necessary to answer Interrogatory No. 6 is neither within the personal knowledge of Dikar's employees nor ascertainable from the relevant documents in Dikar's possession, which date back to January, 1993. Subject to and without waiver of the foregoing objections, Dikar will produce all invoices dating from January, 1993 through the date of the complaint that it has located within its possession, custody or control from which plaintiff can calculate the approximate total amount billed by Dikar to CVA for firearm sales during that period. Because the burden of deriving or ascertaining such information is substantially the same for plaintiff as for Dikar, these invoices will be produced by Dikar pursuant to Fed. R. Civ. P. 33(d) in the group of documents numbered DHK2 - DHK644.

Interrogatory No. 7:

State and describe in detail the length of time and nature of the relationship between Defendant Dikar and Defendant CVA, including:

(a) how many rifles have been purchased;

(b) when was first purchase made; and

(c) whether the relationship still exists.

Answer:

Dikar objects to Interrogatory No. 7 on the ground that the terms "nature of the relationship" and "relationship" are unduly vague and ambiguous. Dikar also objects to Interrogatory No. 7 on the ground that it is unlimited in scope of time, calling for information dating back approximately eighteen years, when CVA made its first purchase of rifles from Dikar. Because of the broad period of time involved, all of the information necessary to answer Interrogatory No. 7 is neither within the personal knowledge of Dikar's employees nor ascertainable from the relevant documents in Dikar's possession, which date back to January 1993. Subject to and without waiver of the foregoing objections, Dikar states that (i) Dikar has no common ownership with CVA and has never had any business relationship with CVA other than as seller of guns to CVA; (ii) Dikar has sold guns to CVA since Dikar was formed as a cooperative in 1979; (iii) as explained above, Dikar has no way of calculating the total of number of rifles purchased through the years by CVA from Dikar; (iv) as explained above, Dikar will produce sales invoices pursuant to Fed. R. Civ. P. 33(d) from which plaintiff may derive or ascertain the approximate total number of rifles shipped by Dikar to CVA from January 1993 through the date of the filing of the complaint; and (v) Dikar continues to make sales of guns to CVA.

Interrogatory No. 8:

Identify all entities to whom Defendant Dikar has supplied guns, including name, address and telephone number.

Answer:

Dikar objects to Interrogatory No. 8 on the grounds that information regarding non-U.S. entities that have purchased Dikar's guns that are not of the model at issue in this case and have sold them outside the United States is (i) neither relevant to the jurisdictional issues nor reasonably calculated to lead to the discovery of admissible evidence relevant to such issues; and (ii) confidential business and proprietary information. Dikar also objects to Interrogatory No. 8 on the ground that it is unlimited in scope of time. Subject to and without waiver of the foregoing objections, Dikar states that CVA is the only U.S. entity that purchased guns from Dikar during the period of the events allegedly giving rise to plaintiff's claims. Plaintiff already is aware of CVA's address and telephone number.

Interrogatory No. 9:

State whether Defendant Dikar has, or has had, any parent corporation or any subsidiary corporation.

Answer:

Dikar has never had any parent corporation or subsidiary corporation.

Interrogatory No. 10:

State whether or not Defendant Dikar has, or has had any affiliation with any U.S. business or entity.

Answer:

Dikar objects to Interrogatory No. 10 on the ground that the term "affiliation" is unduly vague and ambiguous. Subject to and without waiver of the foregoing objection, Dikar states that it does not have, and did not have during the period of the events allegedly giving rise to plaintiff's claims, any ownership interest in any U.S. business or entity.

Interrogatory No. 11:

State the nature and describe the activities of Defendant Dikar to market its products in the world market, including its admitted intent that this rifle be used in the United States.

Answer:

Dikar objects to Interrogatory No. 11 on the grounds that (i) the terms "market" and "world market" are unduly vague and ambiguous; (ii) information relating to sales of Dikar's products that are not the rifle model at issue in this lawsuit and that were never purchased by Kentucky residents is neither relevant to this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence; (iii) information relating to sales of any of Dikar's products that were never purchased by any person in Kentucky is neither relevant to

the personal jurisdiction issues nor reasonably calculated to lead to the discovery of admissible evidence relevant to such issues; and (iv) the interrogatory assumes facts not in evidence and mischaracterizes Dikar's position by stating that Dikar has "admitted intent that this rifle be used in the United States." Subject to and without waiver of the foregoing objections, Dikar states that (i) Dikar has never advertised any of its products through any medium intended to reach a retail customer in Kentucky; (ii) Dikar has never sold any product in Kentucky; (iii) Dikar's name has never appeared on any product sold by CVA or any other entity in Kentucky; and (iv) Dikar does not have any regular channel (by telephone, mail, facsimile or otherwise) to answer questions or to provide advice, instructions or other information to retail customers who reside in Kentucky.

Interrogatory No. 12:

Describe the activities of Defendant Dikar to advertise its products, directly or indirectly, expected to reach U.S. entities, including Internet listings.

Answer:

Dikar objects to Interrogatory No. 12 on the grounds that (i) the phrases "activities of Defendant Dikar to advertise", "Internet listings" and "expected to reach U.S. entities" are unduly vague and ambiguous, and (ii) information relating to any advertising that Dikar intended to be received in jurisdictions outside of Kentucky is neither relevant to the issues in this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence. Subject to

and without waiver of the foregoing objection, Dikar states that it has not engaged in any advertising of its products that it intended to be received in Kentucky.

Interrogatory No. 13:

Describe the manner in which Defendant CVA came to the attention of Defendant Dikar, including the nature of the commencement of the business relationship.

Answer:

Dikar objects to Interrogatory No. 13 on the ground that the phrases "manner in which Defendant CVA came to the attention of Defendant Dikar" and "nature of the commencement of the business relationship" are unduly vague and ambiguous. Dikar also objects to Interrogatory No. 13 on the ground that it requests information that is neither relevant to the personal jurisdiction issues nor reasonably calculated to lend to the discovery of admissible evidence relevant to such issues. Dikar further objects to Interrogatory No. 13 on the ground that it calls for information dating back approximately eighteen years, when CVA made its first purchase of rifles from Dikar. Because the events pertaining to Interrogatory No. 13 occurred almost two decades ago, all of the information necessary to answer this interrogatory fully is neither within the personal knowledge of Dikar's employees nor ascertainable from the relevant documents in Dikar's possession, which date back approximately four years before the filing of the complaint. Subject to and without waiver of the foregoing objections, Dikar states that CVA became a customer of Dikar in 1979,

when Dikar was formed from another Spanish cooperative, Mendi S.C. ("Mendi"). Mendi had been a producer of guns for Jukar, a Spanish corporation, which sold the guns to CVA. Dikar believes that Jukar first began selling guns to CVA in the early 1970s when CVA first approached Jukar in Spain to purchase guns. When Dikar was formed, Jukar went out of business and CVA became a customer of Dikar.

Interrogatory No. 14:

State the nature of any exclusive rights by Defendant CVA to market and/or sell rifles manufactured by Defendant Dikar in this country.

Answer:

Dikar objects to Interrogatory No. 14 on the grounds that (i) the phrase "nature of any exclusive rights" and the term "market" are unduly vague and ambiguous; (ii) the interrogatory asks for information that is neither relevant to this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence; and (iii) the interrogatory is unlimited in scope of time. Subject to and without waiver of the foregoing objections, Dikar states that (i) at all times relevant to the complaint CVA was the only entity that sold in the United States rifles produced by Dikar; and (ii) information responsive to this interrogatory is contained in agreements between CVA and Dikar that will be produced subject to the conditions stated in response to Document Request No. 10.

Interrogatory No. 15:

Describe the nature of Defendant Dikar's knowledge of the marketing and sales of muzzle-loading rifles in the U.S.

Answer:

Dikar objects to Interrogatory No. 15 on the grounds that (i) the phrase "nature of Defendant Dikar's knowledge" and the term "marketing" are unduly vague and ambiguous; (ii) the interrogatory is not neither limited in scope of time nor limited with respect to brands, manufacturers and distributors of muzzle-loading rifles; and (iii) the interrogatory seeks confidential business and proprietary information. Subject to and without waiver of the foregoing objections, Dikar states that (i) Dikar has never advertised or sold any muzzle-loading rifle in the United States; and (ii) Dikar is aware that CVA and other entities have advertised and sold muzzle-loading rifles in the United States.

Interrogatory No. 16:

Describe the nature of Defendant Dikar's membership in the Mondragon Corporacion Cooperativa, including all promotional activities conducted by Mondragon Corporacion Cooperativa expected to reach U.S. consumers.

Answer:

Dikar objects to Interrogatory No. 16 on the grounds that (i) the phrases "nature of Defendant Dikar's

membership", "promotional activities" and "expected to reach U.S. consumers" are unduly vague and ambiguous; (ii) any information regarding Mondragon Corporacion Cooperativa ("Mondragon") is not relevant to this lawsuit or reasonably calculated to lead to the discovery of admissible evidence; and (iii) any information regarding any cooperative that is a member of Mondragon other than Dikar is not relevant to the lawsuit or reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing objections, Dikar states that (i) Dikar is one of numerous Spanish cooperatives that are members of Mondragon; (ii) the cooperatives that are members of Mondragon are separate legal entities from each other, and each has independent ownership and management; and (iii) Mondragon has no ownership interest in Dikar.

[Verification, Signature Block and
Certificate of Service omitted]

APPENDIX R

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CIVIL ACTION NO. 97-28

MATTHEW HAYMAKER PLAINTIFF

V.

CONNECTICUT VALLEY ARMS;
WAL-MART STORES, INC.;
DIKAR, S. COOP. LTDA.; and
GENE SEARS SUPPLY CO. DEFENDANTS

AMENDED NOTICE TO TAKE VIDEOTAPED DEPOSITIONS

[Filed December 22, 1997]

* * * * *

NOTICE IS HEREBY GIVEN, that the Plaintiff, by counsel, will on TUESDAY, JANUARY 13, 1998, take the depositions upon oral examination of the following witnesses:

1. Jon Muniategui, General Manager. Subject - all aspects of Dikar operations;

2. Julian Echeberria, Technical Director. Subject - design manufacture and testing of guns;

3. Aitor Diaz DeMendibil, Quality Manager. Subject - design manufacture and testing of guns;

4. Antonio Cabello, Official Proof House Director;

5. Martxiel Genova, Techniker. Subject - testing by independent laboratory.

[All were identified by counsel for Dikar as persons with discoverable information concerning this case on September 4, 1997.]

These depositions shall be taken at the following location unless other arrangements have been made by the parties:

The Hotel Maria Christina, San Sebastian, Spain.

Pursuant to FRCP 30(b)(5), the witnesses shall produce all blueprints, diagrams or other documents which show the design specifications of the replacement barrel of the Buckmaster rifle, including all material specifications.

These depositions shall be taken by videotape and stenographic transcription and shall be taken IN CONFORMITY WITH AND PURSUANT TO ANY AND ALL PURPOSES PROVIDED BY THE FEDERAL RULES OF CIVIL PROCEDURE (unless the Court should otherwise rule).

The depositions shall begin at 9:00 a.m. and shall continue from day to day until completed.

The purpose of this Amended Notice is to add the FRCP 30(b)(5) document request.

PETER PERLMAN LAW OFFICES, P.S.C.
388 SOUTH BROADWAY
LEXINGTON, KENTUCKY 40508
TELEPHONE: (606) 253-3919

By:_____
ATTORNEY FOR PLAINTIFF

[Certificate of Service omitted]

APPENDIX S

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re	)	
DIKAR, S. COOP. LTDA,	)	Docket No. 98-5001
Petitioner	)	

PETITION OF DIKAR, S. COOP. LTDA FOR WRIT OF MANDAMUS

[Filed January 6, 1998]

* * * * *

Relief Sought

Petitioner Dikar, S. Coop. LTDA ("Dikar") is a defendant in a products liability action now pending in the United States District Court for the Eastern District of Kentucky entitled *Matthew Haymaker v. Connecticut Valley Arms, et al.*, Civil Action No. 97-28. Dikar moved to dismiss the action pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure on the ground that the district court lacked personal jurisdiction over it. The district court has deferred substantive consideration of that motion, however, until after completion of "all discovery". Dikar seeks a writ from this Court directing that discovery concerning Dikar be limited to the issue of the district court's personal jurisdiction

over Dikar until after the district court determines the personal jurisdiction issue.

Issues Presented

I. Whether the Due Process Clause of the United States Constitution allows the district court to require a defendant which is a legal entity of a foreign country to participate in non-jurisdictional discovery prior to a determination by the district court of such defendant's motion to dismiss for lack of personal jurisdiction.

II. Whether a defendant, which is a legal entity of a foreign country that is a signatory of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention") and which has moved to dismiss the action for lack of personal jurisdiction, can be required to submit to discovery under the procedures of the Federal Rules of Civil Procedure on matters unrelated to the personal jurisdiction issue prior to a ruling by the district court that it has personal jurisdiction over such defendant.

* * * * *

Reasons Why The Writ Should Issue

I. REQUIRING DIKAR TO PARTICIPATE IN NON-JURISDICTIONAL DISCOVERY PRIOR TO A DETERMINATION BY THE DISTRICT COURT OF DIKAR'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION VIOLATES THE DUE

PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The district court's orders which provide that "all discovery" must be completed before it will address Dikar's motion under Rule 12(b)(2) impose a substantial burden on Dikar, a Spanish cooperative organized and existing under the laws of Spain, which may not have the necessary contacts with the forum state to allow the action to proceed against it consistent with the Due Process Clause of the United States Constitution. *See, e.g., Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); International Technologies Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386 (6th Cir. 1997); *Nationwide Mutual Insurance Co. v. Tryg International Insurance Co.*, 91 F.3d 790 (6th Cir. 1996); *Halderman v. Sanderson Forklifts Co.*, 818 S.W.2d 270 (Ky. Ct. App. 1991). That burden may come not only from substantive discovery of Dikar but also from the necessity under the district court's order for Dikar to participate in substantive discovery of plaintiff and other defendants as well as third-party witnesses before it can get a ruling from the district court about whether it is even properly before the court. A particularly onerous aspect of the district court's orders concerns expert witnesses. Under the district court's orders, counsel for Dikar must retain and disclose no later than February 13, 1998, the identity of expert witnesses who may be used at trial and written reports by the expert witnesses as required by Rule 26(a)(2) of the Federal Rules of Civil Procedure -- all before the district court will even consider the issue of whether Dikar is subject to its jurisdiction. (App. tab 14, docket entry 39; App. tabl 16, docket entry 45).

The district court's orders requiring Dikar to participate in "all discovery" violate Dikar's rights under the Due Process Clause. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Supreme Court considered the issue of what sanctions might be imposed under Rule 37 of the Federal Rules of Civil Procedure upon a defendant which had moved to dismiss the action for lack of personal jurisdiction and which had refused to comply with discovery demands limited to the jurisdictional issue. As the Supreme Court phrased the questions presented by the case: "May a district court, as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts, proceed on the basis that personal jurisdiction over the recalcitrant party has been established?" *Id.* at 695. The Court concluded that "the application of a legal presumption to the issue of personal jurisdiction does not in itself violate the Due Process Clause". *Id.* at 70. the Court's opinion is clear, however, that discovery relating to a defendant which had moved to dismiss the action for lack of personal jurisdiction must be limited to the issue of jurisdiction:

> CBG was seeking through discovery to respond to petitioners' contention that the District Court did not have personal jurisdiction. Having put the issue in question, petitioners did not have the option of blocking the reasonable attempt of CBG to meet its burden of proof. It surely did not have this option once the court had overruled petitioners' objections. Because of petitioners' failure to comply with the discovery orders, CBG was unable to establish the full extent of the contacts between petitioners and Pennsylvania, the critical issue in proving personal jurisdiction.

Id. at 708-09. Numerous court of appeals decisions have also recognized that discovery relating to a defendant which has moved to dismiss for lack of personal jurisdiction must be limited to the jurisdictional issue. *E.g.*, *International Technologies Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386, 390 (6th Cir. 1997) ("The plaintiff was directed to respond to the motion after completion of discovery on the jurisdictional issues."); *Nationwide Mutual Insurance Co. v. Tryg International Insurance Co.*, 91 F.3d 790, 792 (6th Cir. 1996) ("The parties then conducted limited jurisdictional discovery, after which Nationwide filed its opposition to Tryg International's motion."); *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 680 (1st Cir. 1992) ("The Boits could have requested that the court allow discovery on the limited issue of personal jurisdiction."); *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991) ("Presented with a properly supported 12(b)(2) motion and opposition, the court . . . may permit discovery in aid of deciding the motion . . . ."). *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981) ("The District Court expressly found that there is no reasonable basis to expect that further discovery would reveal contacts sufficient to support personal jurisdiction.").

This Court in *Nationwide Mutual Insurance Co. v. Tryg International Insurance Co.*, 91 F.3d at 797, noted that the Supreme Court in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 114 (1987), had cautioned that the "unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.'" This Court in *Nationwide Mutual Insurance* the continued that "Special concerns arise when a plaintiff attempts to bring a foreign defendant within our national borders". 91 F.3d at 797. In

International Technologies Consultants, Inc. v. Euroglas S.A., 107 F.2d at 396, this Court emphasized "the responsibility we have as an American court to exercise great care and 'reserve' when it comes to extending our notions of personal jurisdiction into the international field." Those concerns are particularly acute where a district court has imposed on a foreign defendant all of the burdens of unlimited discovery under the Federal Rules of Civil Procedure before even addressing the merits of a motion to dismiss for lack of personal jurisdiction. The district court's order of August 19, 1997, requiring completion of "all discovery' before it rules on Dikar's motion to dismiss for lack of personal jurisdiction violates the constitutional protection afforded Dikar under the Due Process Clause, and this Court should issue a writ of mandamus directing that discovery concerning Dikar be limited to the issue of the district court's personal jurisdiction over Dikar until after the district court rules on Dikar's motion to dismiss pursuant to Rule 12(b)(2).

II. THE DISTRICT COURT DOES NOT HAVE THE AUTHORITY TO ORDER NON-JURISDICTIONAL DISCOVERY OF DIKAR PURSUANT TO THE PROCEDURES OF THE FEDERAL RULES OF CIVIL PROCEDURE PRIOR TO A DETERMINATION THAT IT HAS PERSONAL JURISDICTION OVER DIKAR.

In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), Mr. Justice Stevens delivered the opinion of the Supreme Court of the United States in which four other justices joined, and Mr. Justice Blackmun delivered a separate opinion concurring in part and dissenting in part, joined by Justices Brennan, Marshall and O'Connor. The question

presented in that case was set forth at the beginning of Mr. Justice Stevens' opinion for the Court:

> The question presented in this case concerns the extent to which a federal district court must employ the procedures set forth in the [Hague Evidence Convention] when litigants seek answers to interrogatories, the production of documents, and admissions form a French adversary over whom the court has personal jurisdiction.

Id. at 524. The Court's opinion concluded that the Hague Evidence Convention "does not divest the District Court of jurisdiction to order discovery under the Federal Rules of Civil Procedure" and that "the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention." *Id.* at 540-41. [footnote omitted]

Both the opinion of the Court and the opinion of Mr. Justice Blackmun, however, recognize that the discovery procedures of the Federal Rules do not apply to non-jurisdictional discovery of a defendant until after a determination of personal jurisdiction over such defendant. The question presented as framed at the beginning of the opinion of the Court and quoted above concerned the availability of Federal Rules discovery from a foreign defendant "over whom the court has personal jurisdiction." *Id.* at 524. The opinion of the Court then repeatedly emphasizes the necessity for a determination of personal jurisdiction of a foreign defendant before the Federal Rules discovery procedures apply. That opinion states that the petitioners in *Societe Nationale* "answered the complaints, apparently without questioning the jurisdiction of the District

Court." *Id.* at 525. The opinion of the Court twice notes that the lower court opinion of the United States Court of Appeals for the Eight Circuit had stated that the district court had jurisdiction over the French defendant: "It then held that 'when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply . . . .'" *Id.* at 528. "That court concluded that the Convention simply 'does not apply' to discovery sought from a foreign litigant that is subject to the jurisdiction of an American court." *Id.* at 540. The opinion of the Court further stated that "since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures". *Id.* at 540 n. 25. The same point was also emphasized in the opinion of Mr. Justice Blackmun: "It is well established that a court has the *power* to impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party." *Id.* at 553 n.4.

In *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), *vacated*, 483 U.S. 1002 (1987), the United States Court of Appeals for the Fifth Circuit also emphasized the necessity for a determination of personal jurisdiction over a foreign defendant prior to non-jurisdictional discovery under the procedures of the Federal Rules. The court stated that "the Hague Convention does not supplant the application of the discovery provisions of the Federal Rules over foreign, Hague Convention state nationals, subject to *in personam* jurisdiction in a United States Court." *Id.* at 604. The court noted that the district court had ruled that it had personal jurisdiction over Anschuetz. *Id.* The court discussed the conclusion in *Lasky v. Continental Products Corp.*, 569 F.Supp. 1227, 1228-29 (E.D. Pa. 1983), that "foreign parties

and domestic parties are equally subject to the Federal Rules of Civil Procedure so long as personal jurisdiction is gained." 754 F.2d at 608. The court then stated" Having been found reachable under the Louisiana long-arm statute, Anschuetz is subject to the Federal Rules discovery provisions." *Id.* at 609. The Supreme Court vacated the judgment in *Anschuetz*, 483 U.S. 1002 (1987), and remanded the case to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Societe Nationale*. On remand, the Fifth Circuit again emphasized that use of Federal Rules discovery procedures was permissible only "where the party in question was subject to the *in personam* jurisdiction of the United States courts." *In re Anschuetz & Co.*, 838 F.2d 1362, 1363 (5th Cir. 1988).

In *Beckman Instrumens, Inc. v. LKB Produckter AB*, Civil Action No. R-85-3133, 1986 U.S. Dist. LEXIS 30586, 229 U.S.P.Q. (BNA) 78 (D. Md. Jan 10, 1986), [footnote omitted] the district court addressed the issue presented by Dikar's petition here. The court in that case concluded that "the Hague Convention need not be followed for pretrial discovery when the American court has personal jurisdiction over the foreign entity." The court noted that one of the defendants, Wallac Oy, had never challenged the court's personal jurisdiction and "[a]ccordingly, plaintiff need not follow the procedure for pretrial discovery established by the Hague Convention and may resort to the more liberal Federal Rules." The court continued that another defendant, LKB Produkter, had challenged the court's personal jurisdiction, and the court limited discovery under the Federal Rules to questions "which address the jurisdictional issue." The court then concluded:

> Should the Court determine that there is personal jurisdiction over LK Produkter, then plaintiff need not first proceed along the guidelines established under the Hague Convention. However, if the Court finds that it lacks personal jurisdiction over LKB Produkter, all further discovery must follow the procedures of the Hague Convention treaty.

Since the district court in this action has not yet determined that it has personal jurisdiction over Dikar, it does not have the authority to order non-jurisdictional discovery of Dikar pursuant to the procedures of the Federal Rules of Civil Procedure.

[Conclusion, signature block and
Certificate of Service omitted]

Supreme Court, U.S.
FILED
JUN 18 1998
CLERK

No. 97-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DIKAR, S. COOP. LTDA, - - - - *Petitioner,*

versus

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (MATTHEW HAYMAKER, REAL PARTY IN INTEREST) - - *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER PERLMAN
PETER PERLMAN LAW OFFICES, P.S.C.
388 South Broadway
Lexington, Kentucky 40508
(606) 253-3919
Attorney for Respondent

June 17, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether a defendant, whose motion to dismiss for lack of jurisdiction has been denied with leave to renew, may refuse the District Court's direction to provide full discovery to the plaintiff.

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8 Wright & Miller, Federal Practice and Procedure §2040 p.521 (1994) 6

ORDERS BELOW

The order of the court of appeals, which is unreported, is reprinted at App. 1a. The court of appeals' denial of the petition for rehearing and suggestion for rehearing en banc is also unreported and is reprinted at App. 3a. The relevant orders of the district court, all of which are unreported, are reprinted at App. 4a-8a.

No. 97-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DIKAR, S. COOP. LTDA, - - - - - - Petitioner,

versus

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (MATTHEW HAYMAKER, REAL PARTY IN INTEREST) - - - Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. Factual Background

On September 26, 1996, Matt Haymaker purchased a muzzle-loading rifle from the Richmond, Kentucky, Wal-Mart store. The rifle was a Connecticut Valley Arms (hereafter "CVA") .50-caliber "Buckmaster" inline muzzle-loading rifle, which cost $214.96. It was a birthday gift from his parents. At the time, Matt was 22 years old and a student at Eastern Kentucky University.

On October 1, 1996, Matt was firing the rifle for the *first time.* He was accompanied by a friend to a target range, and they alternated shots while setting the sights on the rifle. On approximately the ninth shot, the rear end of the gun barrel exploded in Matt's face, and he suffered catastrophic injuries. He was treated at the U.K. Medical Center for a ruptured globe of the right eye with corneoscleral laceration, facial lacerations, and orbital and maxillary sinus fractures.

Matt has suffered severe permanent damages including the loss of his right eye.

II. Procedural Background

On December 27, 1996, a lawsuit was filed against CVA and Wal-Mart Stores, Inc., in the Scott Circuit Court. On January 28, 1997, the Defendants removed the case to the U.S. District Court for the Eastern District of Kentucky.

Defendant CVA served its answers to Plaintiff's interrogatories in which it stated that it was not the manufacturer of the "muzzle-loader" in question. Since it was not the manufacturer, CVA took the position that it was not required to produce blueprints, diagrams, or any testing documents.

On March 19, 1997, the Plaintiff moved to file an Amended Complaint adding two additional defendants, including (a) Dikar, S. Coop. LTDA., Bergara, Spain (manufacturer of the rifle); and (b) Gene Sears Supply Co., El Reno, Oklahoma (supplier of the rifle to Wal-Mart).

On July 30, 1997, Defendant Dikar filed its Motion to Dismiss the Amended Complaint on the ground that the district court lacked personal jurisdiction. Attached to this motion was an affidavit of a Dikar executive. As another attachment to its motion, Dikar submitted a bill of lading indicating that Matt's Buckmaster rifle was one of a shipment of 398 identical rifles, along with 3,175 other rifles, sent to CVA in the United States.

At the time of this motion, only one deposition had been taken by any party in this case. This was a deposition of Neill Stevens, Vice President of a claims adjusting service retained by CVA. In the course of his deposition, Mr. Stevens disclosed thirteen other incidents which involved various similarities, including:

1. All involved a new or nearly new .50 caliber inline muzzle-loading rifle sold by CVA and manufactured by Dikar;

2. All involved barrel explosions, many involved serious eye damage, and they occurred between September and December 1996;

3. Four of these other incidents occurred in Kentucky, three in Ohio, two in Virginia, two in Tennessee, one in Louisiana, and one in Michigan.

Plaintiff responded to the motion to dismiss on the merits, citing the relevant law and the evidence as it was known at that time (App. 9a).

On August 19, 1997, the district court *denied* Dikar's motion for dismissal on jurisdictional grounds, saying that Dikar could renew its motion following the completion of "*all* discovery" (App. 4a).

On August 26, 1997, Dikar filed its Motion for Modification of the August 19 Order, asking the district court to expressly limit discovery to jurisdictional issues. Dikar also asked for leave to take an interlocutory appeal of the earlier Order.

On September 11, 1997, Plaintiff served his Response to Dikar's Motion to Limit Discovery, pointing out the inefficiency of splitting the discovery, the discretionary nature of the district court's ruling on scope of discovery, and the ultimate need for all the discovery from Dikar as part of Plaintiff's case against the other parties.

On October 8, 1997, the district court entered an Order specifically denying Dikar's motion for modification and

specifically reaffirming its earlier Order "granting open discovery as opposed to limited discovery pertaining only to the personal jurisdiction issue." The Order also refused to certify the issue for an interlocutory appeal (App. 5a).

On December 17, 1997, the district court granted Plaintiff's motion to depose representatives of Dikar in Spain, pursuant to the Federal Rules of Civil Procedure (App. 7a). The order further provided that ". . . deponents' responses in said depositions SHALL NOT be limited to questions concerning only jurisdictional issues . . . ."

ARGUMENT

A. Dikar is Not Entitled to Mandamus Because The District Court Has Ruled on Personal Jurisdiction

Dikar's entire factual premise for its Petition for Mandamus is incorrect, since the district court has properly ruled on and *denied* Dikar's motion to dismiss for lack of personal jurisdiction. Dikar has suggested to this Court that Plaintiff's only response to Dikar's motion to dismiss was that it was premature. This is incorrect. Plaintiff's Response of August 15, 1997, cited the applicable law and the available discovery (App. 9a).

Plaintiff's response cited Sixth Circuit decisions as to personal jurisdiction under the Due Process Clause. Then Plaintiff argued that Dikar had met the requirements of personal jurisdiction, since it had manufactured hundreds of firearms for an American distributor, CVA, with the intention (according to Dikar's own affidavit) that they be sold and used in the United States. Plaintiff recited the proof (in Dikar's affidavit) that Dikar did not limit the states in which CVA could distribute the rifles. Plaintiff pointed out that CVA is the *only* company that distributes Dikar's sporting guns in the U.S. (once again from Dikar's affidavit) and that it received substantial profits from their

sale in Kentucky, as well as other states. Plaintiff argued the merits of the requirements of (a) purposeful availment, (b) actions in Kentucky, and (c) reasonableness of the exercise of jurisdiction.

The proof, even at that time, showed that the motion should be denied on the merits. This is what the district court has clearly done. The district court's order of August 19 states that the motion to dismiss was "denied." It was *not* held in abeyance. The district court did not rule that the motion was premature. The court simply decided the issue before it. The district court had more than enough evidence on which to conclude that Dikar's motion to dismiss was without merit. In the absence of an evidentiary hearing, it is the district court's duty to consider all proof on such a motion in the light most favorable to the plaintiff, *Nationwide Mutual Ins. Co.* v. *Tryg International Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1996), and the plaintiff need only make a *prima facie* showing of personal jurisdiction, *International Technologies Consultants, Inc.* v. *Euroglas S.A.*, 107 F.3d 386, 391 (6th Cir. 1997).

The district court's ruling on the issue was further emphasized on October 8, when the Court reaffirmed its Order and denied Dikar's motion to specifically limit discovery to jurisdictional issues. Once again, the district court did not hold that the issue was in abeyance or was premature; instead, it *denied* the motion.

In short, Dikar has failed to show that it is clearly entitled to relief, since it cannot even demonstrate the basic factual premise of its motion. The pleadings, proof and orders demonstrate that the district court has ruled on Dikar's motion. Discovery on all issues should now proceed under the Federal Rules of Civil Procedure. *Societe Nationale Industrielle Aerospatiale* v. *U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 542 (1987).

B. The Requirements of Mandamus Have Not Been Shown in This Case

Even if Dikar were correct, and the district court had not yet decided the motion to dismiss for lack of personal jurisdiction, Dikar would not be entitled to mandamus.

As the cases cited by the court of appeals panel pointed out, in denying Dikar's mandamus petition, mandamus is not available to control the district court in the exercise of its discretionary duties. *In re American President Lines, Ltd.*, 929 F.2d 226, 227 (6th Cir. 1991); *In re Post-Newsweek Stations*, 722 F.2d 325, 329 (6th Cir. 1983). Here, the ruling of the district court to which Dikar objects is its order that the discovery methods under the Federal Rules of Civil Procedure may be used to take discovery from the Spanish manufacturer, both as to jurisdiction and as to the merits of this products liability case. This matter is part of the Court's discretion in balancing the needs and rights of the parties in pre-trial discovery activity. The scope of discovery is within the Court's discretion. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir 1981), *cert. denied*, 454 U.S. 893 (1981); *Theunissen* v. *Matthews*, 935 F.2d 1454, 1465 (6th Cir. 1991). A District Court *need not* limit discovery to jurisdictional questions. The Court's discretion to limit discovery is discussed in 8 Wright & Miller, *Federal Practice and Procedure* §2040 p.521 (1994):

> Ever since the days of the former equity bill for discovery there has been applied to discovery "the principle of judicial parsimony," by which, when one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided. In accordance with this principle — *a salutary principle if it is applied sparingly and with real discretion rather than as an absolute rule* — a court may decide that in a particular case it would be wise to stay discovery on the merits until

challenges to jurisdiction have been resolved. [Emphasis added.]

This discretionary decision of the district court should not be disrupted by piecemeal appeals such as this one.

The panel's cited cases also make it clear that mandamus is generally not available to review discovery orders. *Warden, Kentucky State Penitentiary* v. *Gall*, 865 F.2d 786, 788-9 (6th Cir. 1989); *City of Cleveland* v. *Krupansky*, 619 F.2d 572, 575 (6th Cir.) *cert. denied*, 449 U.S. 834 (1980). There is a recognized exception where discovery raises questions of unusual importance necessary to the economical and efficient administration of justice. Here, all those considerations of economy and efficiency all support the district court's ruling.

In its Petition, Dikar concedes that it is proper to use the federal discovery rules to address the issue of jurisdiction. However, it objects to Plaintiff asking, in the same discovery procedure, whether it be a deposition or interrogatories or requests for documents, other questions concerning the exploding rifle. These matters would include the rifle's blueprints, design, material specifications, testing, and the like. For the sake of economy and efficiency, this should be done at the same time Plaintiff's counsel are in Spain questioning Dikar's representatives as to its contacts with other Defendants, contacts with other entities in the United States, a study prepared for Dikar discussing the United States market for muzzle-loading rifles (produced in discovery), and other efforts to market its rifles in this country.

The logistics of a single trip to Spain for depositions of knowledgeable Dikar representatives will be expensive and time-consuming. To force Matt Haymaker to engage in *two* such trips is to unfairly punish him, since he can less easily afford these expenses than an insurer or the corporate defendants. This burden is unreasonable for this plain-

tiff and for those plaintiffs in the many other injury incidents which have been identified.

It would be a massive waste of judicial resources, and an intimidating doubling of a plaintiff's expenses and effort, to permit every case where lack of jurisdiction is pled to include:

(1) a discovery stage for jurisdiction,

(2) a hearing stage for jurisdiction,

(3) an appellate stage for jurisdiction, followed by

(4) a discovery stage on the merits, then

(5) a trial stage on the merits, and then

(6) an appellate stage on every other matter not raised earlier.

Yet this is exactly what Dikar seeks. It should not be permitted, under the principle of F.R.C.P. 1, which directs that the rules ". . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

The real motives of Dikar are delay and denial of discovery to the Plaintiff. In discovery responses, Dikar has asserted the joint defense privilege, based on its cooperation with Defendant Connecticut Valley Arms. The delay is designed to impede the Plaintiff's access to discovery which is critical to the case against both Defendants. This includes the basic design, materials specifications, and testing for the rifle. On all of these issues, the U.S. distributor CVA claims ignorance. Delay and denial prevent this case from going forward, and delays all the other cases against CVA and Dikar as well.

CONCLUSION

This Court should deny the Petition for Certiorari filed by the Petitioner Dikar, S. Coop. LTDA.

June 17, 1998

Respectfully submitted,

PETER PERLMAN
PETER PERLMAN LAW OFFICES, P.S.C.
388 South Broadway
Lexington, Kentucky 40508
(606) 253-3919
Attorney for Respondent

APPENDIX

Appendix A—Court of Appeals' Order, denying mandamus, filed February 11, 1998 ..... 1a

Appendix B—Court of Appeals' Order, denying rehearing, filed April 23, 1998 ..... 3a

Appendix C—District Court's Order filed August 19, 1997 ..... 4a

Appendix D—District Court's Order filed October 8, 1997 ..... 5a

Appendix E—District Court's Order filed December 17, 1997 ..... 7a

Appendix F—Plaintiff's Response to Dikar's Motion To Dismiss and Plaintiff's Motion for Leave to Take Additional Discovery, filed August 15, 1997 ..... 9a

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 98-5001

In re: DIKAR, S. COOP. LTDA, - - *Petitioner,*

ORDER—Filed February 11, 1998

Before: CONTIE, NORRIS, and CLAY, Circuit Judges.

The petitioner, a foreign defendant in this products liability action, seeks a writ of mandamus directing that discovery in this action be limited to personal jurisdiction issues until after the district court determines whether it can exercise personal jurisdiction over the petitioner. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. It cannot be used to control a district court in the exercise of discretionary duties." *In* re *American President Lines, Ltd.*, 929 F.2d 226, 227 (6th Cir. 1991) (order) (citations omitted); *see In re Post-Newsweek Stations*, 722 F.2d.325, 329 (6th Cir. 1983).

Generally, mandamus is not available to review discovery orders. *See Warden, Kentucky State Penitentiary v. Gall*, 865 F.2d 786, 788-89 (6th Cir. 1989); *City of Cleveland v. Krupansky*, 619 F.2d 572, 575 (6th Cir.) (per curiam). *cert. denied*, 449 U.S. 834 (1980). ln limited circumstances, however, mandamus is available to review pre-

trial discovery rulings. Where a discovery ruling raises "questions of unusual importance necessary to the economical and efficient administration of justice," it may be reviewed in mandamus. *FDIC v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990) (quoting *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1060 (6th Cir. 1982)).

We will not exercise our authority in mandamus to intervene in the district court's management of pretrial discovery in this case. The petitioner has not clearly demonstrated that the district court's orders permitting discovery under the Federal Rules of Civil Procedure are erroneous as matter of law. *See Societe Nationale Industrielle Aerospariale v. United Stares District Court of the Southern District of Iowa*, 482 U.S. 522, 541 (1987) (holding that the Hague Convention procedures for taking evidence abroad are not exclusive or mandatory).

It therefore is ORDERED that the petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 98–5001

IN RE: DIKAR, S. COOP. LTDA, - - - *Petitioner.*

ORDER—Filed April 23, 1998

Before: CONTIE, NORRIS, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but aiso to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 97-28

MATTHEW HAYMAKER - - - - - *Plaintiff*

versus

CONNECTICUT VALLEY ARMS; AND
WAL-MART STORES, INC. - - - - *Defendants*

ORDER—Filed August 19, 1997

The Defendant Dikar, S. Coop. LTDA having moved to dismiss the Complaint against it, on the ground of lack of personal jurisdiction, the Plaintiff having responded, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the PIaintiff's motion for leave to conduct additional discovery is GRANTED Following the completion of all discovery, thc Defendant Dikar may renew any dispositive motion concerning jurisdictional issues.

This 19th day of August, 1997.

/s/ Karl S. Forester
Judge, U.S. District Court

Copies to Counsel

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 97-028

MATTHEW HAYMAKER, - - - - *Plaintiff,*

versus

CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC.,
DIKAR, S. COOP LTDA, and
GENE SEARS SUPPLY COMPANY, - - *Defendant.*

ORDER—Filed October 8, 1997

This matter is before the Court upon the Motion of the defendant, Dikar, S. Coop LTDA ("Dikar") for modification of the Orders this Court entered on August 5 and 19, 1997, to wit, the Order for Meeting and Report and the Order granting open discovery as opposed to limited discovery pertaining only to the personal jurisdiction issue. Moreover, Dikar requests that if this Court denies its Motion to Modify said Orders, that the Court certify the issue pursuant to 28 U.S.C. § 1292(b) for appellate review and stay the respective orders pending resolution of the appeal. The Court, having read the parties' briefs and remaining confident in its previous ruling and being otherwise fully and sufficiently advised, HEREBY ORDERS THAT DEFENDANT'S MOTION TO MODIFY SAID ORDERS [docket entry 28] IS DENIED. FURTHER, THIS ISSUE SHALL NOT BE CERTIFIED FOR APPEAL.

This 8th day of October, 1997.

/s/ Karl S. Forester
Karl S. Forester, Judge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 97-028

MATTHEW HAYMAKER, - - - - - - *Plaintiff,*

versus

CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC.,
DIKAR S. COOP. LTDA, and
GENE SEARS SUPPLY CO., - - - - - *Defendants.*

ORDER—Filed December 17, 1997

This matter is before the Court upon the motion of the plaintiff, Matthew Haymaker, to conduct the depositions of representatives of Dikar, S. Coop. LTDA ("Dikar"), set to be taken in Spain. in the above-styled action pursuant to the Federal Rules of Civil Procedure [docket entry 54], and upon plaintiffs motion to co mpel defendant Dikar, S. Coop. LTDA, to answer plaintiffs discovery requests and for sanctions [docket entry 55], Defendant filed its response to the same on December 8, 1997 [docket entry 61], to which plaintiff filed his reply on December 10,1997 [docket entry 63]. Accordingly, all matters are ripe for review.

The Court, being Otherwise hilly and sufficiently advised, hereby ORDERS THAT:

1) the motion of the plaintiff to conduct the depositions of representatives of Dikar, set to be taken in Spain, in the ab ove-styled action pursuant to

the Federal Rules of Civil Procedure [docket entry 54], IS GRANTED:

2) deponents' responses in said depositions SHALL NOT be limited to questions concerning only jurisdictional issues;

3) the motion of the plaintiff to compel defendant Dikar to answer plaintiff's dis covery requests which are not related to jurisdictional issues, as the Court had specifically ruled that discovery is to be wide-open and not limited to jurisdictional issues, [docket entry 55] IS GRANTED TO THE EXTENT THAT DEFENDANT'S ONLY OBJECTION TO SUCH REQUESTS ARE THAT tHEY EXCEED THE SCOPE OF JURISDICTIONAL ISSUES; and

4) the motion of the plaintiff for sanctions pursuant to Fed.R.Civ.P. 37(b)(2) for defendant's failure to answer plaintiff's discovery requests in violation of this Court's orders [docket entry 55] IS PASSED UNTIL THE COMPLETION OF TRIAL.

This 17th day of December, 1997.

/s/ Karl S. Forester
Karl S. Forester, Judge

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 97-28

MATTHEW HAYMAKER - - - - - - *Plaintiff*

versus

CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC.,
DIKAR S. COOP. LTDA, and
GENE SEARS SUPPLY CO. - - - - - *Defendants*

PLAINTIFF'S RESPONSE TO DIKAR'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR LEAVE TO TAKE ADDITIONAL DISCOVERY

—Filed August 15, 1997

I. INTRODUCTION

Defendant Dikar, S. Coop. LTDA. (hereafter "Dikar") has filed its Motion to Dismiss Plaintiff's Amended Complaint, supported by affidavits. Plaintiff would show to the Court that the motion should not be granted for two reasons:

i. The facts, even as recited by Dikar, do not entitle it to be dismissed based on lack of personal jurisdiction; and

ii. The motion is premature, since Plaintiff has had no opportunity to conduct discovery concerning the jurisdictional issues, from Dikar or other defendants with knowledge.

A. SUMMARY OF FACTS

On September 26, 1996, Matt Haymaker purchased a muzzle loading rifle from the Richmond, Kentucky, Wal-Mart store. The rifle was a Connecticut Valley Arms (hereafter "CVA") .50-caliber "Buckmaster" inline muzzle-loading rifle, which cost $214.96. It was a birthday gift from his parents. At the time, Matt was 22 years old and a student at Eastern Kentucky University.

On October 1, 1996, Matt was firing the rifle for the first time. He was accompanied by a friend to a target range, and they alternated shots while setting the sights on the rifle. On approximately the ninth shot, the rear end of the gun barrel exploded in Matt's face, and he suffered catastrophic injuries. He was treated at the U.K. Medical Center. The operative report describes the following injuries:

1. Ruptured globe of the right eye with corneoscleral laceration;
2. Facial lacerations;
3. Orbital and maxillary sinus fractures.

Matt has suffered severe permanent damages including the loss of sight in his right eye.

An illustration of the rifle is attached as Exhibit "A."

B. SUMMARY OF THE LITIGATION

On December 27, 1996, a lawsuit was filed against CVA and Wal-Mart in the Scott Circuit Court. On January 28, 1997, the Defendants removed the case to the U.S. District Court, Eastern District of Kentucky.

On February 13, 1997, the Court ordered counsel for the parties to conduct a meeting as required by Rule 26(f) and to file a written Joint Report no later than March 24, 1997.

In the meantime, CVA served its Answer to Plaintiff's Interrogatories in which it stated that it was not the manufacturer of the "muzzle loader" in question. Since it was not the manufacturer, CVA took the position that it was

not required to produce blueprints, diagrams, or any testing documents.

On March 19, 1997, Plaintiff moved to file an Amended Complaint adding the following additional parties:

1. Dikar, S. Coop. LTDA., Urarte Kalea 26, Poligono Industrial San Lorenzo, 20570 Bergara, Spain; manufacturer of the rifle.
2. Gene Sears Supply Co., P.O. Box 38, El Reno, Oklahoma 73036; supplier of the rifle to Wal-Mart.

The information pertaining to the manufacturer and supplier was provided by counsel for the other Defendants by letter of March 10, 1997. See Exhibit "B."

On March 18, 1997, counsel for Plaintiff and counsel for CVA and Wal-Mart filed a "Joint Motion for Extension of Time" to comply with FRCP 26(f). The basis for the motion was the need to serve the additional Defendants, one of which required service under the Hague Convention. This motion was sustained by the Court's Order of March 26, 1997.

On July 30, 1997, Defendant, Dikar filed its Motion to Dismiss the Amended Complaint on the ground that the Court lacks personal jurisdiction. Absolutely no discovery has been taken from Dikar, or from the other parties concerning their relationship with Dikar. On August 5, 1997, the Court directed all parties to conduct a meeting pursuant to Rule 26(f) and to file a written report no later than September 15, 1997.

Only one deposition has been taken by any party in this case. This was a deposition of Neill Stevens, Vice President of a claims adjusting service retained by CVA. A copy is attached as Exhibit "C." Mr. Stevens was deposed by the Plaintiff on July 14, 1997, concerning his knowledge of Matt Haymaker's case and his knowledge of other similar occurrences. In the course of his deposition, Mr. Stevens disclosed thirteen other incidents which involved the following similarities:

1. They all involved a similar .50 caliber in-line muzzle loading rifle;
2. They all involved rifles that were new or relatively new;
3. They all involved barrel explosions which resulted in injuries to the user, many involving serious eye damage;
4. All of the other incidents occurred between September 1996 and December 1996;
5. Four of these other incidents occurred in Kentucky, three in Ohio, two in Virginia, two in Tennessee, one in Louisiana, and one in Michigan.

In Attachment 2 to its Motion, Dikar submitted a bill of lading indicating that Matt's Buckmaster rifle was one of a shipment of 398 identical rifles, along with other rifles, sent to CVA in the United States.

II. ARGUMENTS

A. DISMISSAL OF DIKAR WOULD VIOLATE DUE PROCESS, AND WOULD BE GROSSLY UNFAIR TO THE PLAINTIFF

The pertinent long-arm statute is K.R.S. 454.210, which permits the Court to exercise jurisdiction over Dikar so long as the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution are satisfied.

In order to satisfy the requirements of the Due Process Clause, the Sixth Circuit has established three elements which must be met. Those include:

> First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Kerry Steel, Inc. v. Paragon Industries, Inc., 106 F.3d 147, 150 (6th Cir. 1997) (quoting Southern Machinery Co., v. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968)).

1. Dikar Purposely Availed Itself of Access to Kentucky's Markets

The first issue is whether or not Dikar purposely availed itself of the privilege of acting in the forum state or causing a consequence in the forum state. In Poyner v. Erma Werke GMBH et al., 618 F.2d 1186 (6th Cir. 1990). *cert. denied*, 449 U.S. 841 (1980), the Defendant, a German gun manufacturer, utilized the services of an American based distributor. The Sixth Circuit held that "The use of an independent distributor so that the manufacturer is only indirectly responsible for the product reaching an injured consumer, in and of itself, will not insulate a non-resident foreign corporation from suit." Id. at 1190 (citing Everly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969)).

There is a difference in the parties' interpretation of applicable cases. First, Dikar relies on World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) to argue that foreseeability of a product's sale in a forum is not enough, standing alone, to satisfy the purposeful availment requirement. However, in World-Wide Volkswagen Corp, this requirement of additional contact was met because the defendant benefitted continually from what he knew to be sales of his product by merchants in the forum state. Likewise, Dikar placed this exploding rifle (and other exploding rifles) into the stream of commerce in this country, without regard for the ultimate location of sale, and it profited from the sales of this rifle and others like it in the Commonwealth of Kentucky.

Dikar also relies on Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987) for the proposition that the placement of a product into the stream of commerce, without more, is not enough to satisfy this due process. It should be pointed out that personal jurisdiction over the defendant in Asahi was denied on other

grounds than purposeful availment. Id at 102. On that non-dispositive issue, four members of the Court concluded that jurisdiction premised on the placement of a product into the stream of commerce, with knowledge of marketing but without a showing of additional conduct, is consistent with the Due Process Clause. Id. at 104. Plaintiff also believes, and has asked leave to conduct discovery to show, that there are additional jurisdictional contacts between Dikar and the forum.

In addition, Dikar cites Halderman v. Sanderson Forklifts Co., 818 S.W.2d 270, 274 (Ky. App. 1991) in support of its argument that this purposeful availment element has not been met. However, Halderman is easily distinguishable from the case at hand. The product in Halderman, a Winget dumper, was sold in Ohio and was never even distributed in Kentucky. "It was merely fortuitous that one Winget dumper ended up in Kentucky." Id. Here, it was not merely fortuitous that Matt Haymaker's exploding rifle ended up in Kentucky. The rifles were and continue to be regularly sold in retail stores in Kentucky.

None of the remaining Sixth Circuit cases relied upon by Dikar are products liability cases. That fact alone is enough to distinguish those from the case at hand. International Technologies Consultants, Inc. v. Euroglas S.A., 107 F.3d 386 (6th Cir. 1997) involved conversion of intellectual property and misappropriation of trade secrets. Conti v. Pneumatic Products Corp., 977 F.2d 978 (6th Cir. 1992) involved fraud and misrepresentation. Finally, Nationwide Mutual Ins. Co. v. Tryg International Ins. Co., 91 F.3d 790 (6th Cir. 1996); Kerry Steel, 106 F.3d 147; and Market/Media Research Inc. v. Union Tribune Publishing Co., 951 F.2d 102 (6th Cir, 1991), cert. denied, 506 U.S. 824 (1992) all involved a breach of contract.

The record reveals that Dikar manufactured hundreds of firearms for an American distributor, CVA, with the intention that the guns would be used in the U.S. and with knowledge that they would be sold in retail outlets throughout this country. Dikar placed no restrictions or limita-

tions on CVA's distribution. Moreover, CVA is the only company that distributes Dikar manufactured sporting guns in the U.S. Matt's case is not an isolated occurrence, nor did this rifle end up in Kentucky fortuitously. The sale of this rifle, and others similar to it, arose from an effort to serve the U.S. market, including Kentucky. Based upon the foregoing, Dikar's activities satisfy the necessary purposeful availment requirement.

2. Plaintiff's Cause of Action Arises from Dikar's Activities in Kentucky

This element requires that Matt's claim have a substantial connection with Dikar's in-state activities. Kerry Steel, Inc., supra, 106 F.3d at 152; Southern Machinery Co., supra, 401 F.2d 374. Plaintiff previously demonstrated Dikar's connection with Kentucky. Dikar's sale of hundreds of rifles to CVA with no restriction as to the area where they were distributed in the U.S., coupled with Dikar's substantial profit on the sales of these rifles in Kentucky, as well as the subsequent Kentucky explosion of several rifles resulting in injuries, is sufficient to satisfy this requirement. Matt's claim, based on his injuries sustained, is directly related to Dikar's activity, the manufacture of exploding rifles distributed and sold in Kentucky.

3. It Would be Reasonable for this Court to Exercise Personal Jurisdiction Over Dikar

Finally, the question is whether or not the exercise of jurisdiction over Dikar would be reasonable. In its brief, Dikar pointed out that the Asahi plurality cautioned lower courts to make "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case," guided by "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state." 480 U.S. at 115. This involves three inquiries.

The first inquiry is whether it is reasonable, from Dikar's perspective, to exercise jurisdiction over it. Dikar should have anticipated being haled into court in Ken-

tucky. Dikar manufactured hundreds of firearms for an American distributor, CVA, with the intention that the guns would be used in the U.S. and with knowledge that they would be sold in retail outlets throughout the this country. Dikar placed no restrictions on CVA's distribution in the U.S. Moreover, CVA is the only company that distributes Dikar manufactured sporting guns in the U.S. This is not an isolated occurrence, nor did this rifle end up in Kentucky fortuitously. The sale of this exploding rifle, and others similar to it, arose from an effort to serve the U.S. market, including Kentucky. Under these circumstances, it is unjust to permit Dikar to plead ignorance as to where the guns were actually sold and escape the jurisdiction of this Court.

Second, the forum's interest in adjudicating the dispute is another factor to be considered. Asahi Metal Industry Co., Ltd., supra, 480 U.S. at 115; Poyner, supra, 618 F.2d at 1192. Claims based on injuries caused by inherently dangerous products imported through independent distributors fall within that class of litigation which the forum state has a deep interest in adjudicating. Poyner, supra, 618 F.2d at 1192. Kentucky's interest in adjudicating this dispute is heightened by the fact that there are four other cases in Kentucky identical to the one at hand. Additionally, Kentucky has a manifest interest in protecting its residents from distant, possibly harassing litigation, particularly when, as here, the injury took place in Kentucky and the product was distributed and sold in Kentucky.

Finally, the plaintiff's interest in obtaining convenient and effective relief is a relevant factor to be considered in determining the reasonableness of requiring a nonresident defendant to litigate a claim in the forum state. Asahi Metal Industry Co., Ltd., supra, 480 U.S. at 115; World-Wide Volkswagen Corp, supra, 444 U.S. at 292. When a foreign corporation such as Dikar places goods into the stream of commerce for distribution throughout the U.S. and it derives substantial revenue from the distribution of

same, it is reasonable that claims emanating from injuries caused by the defective product be litigated where the sale occurred and the injured victim is found. Otherwise, the other thirteen victims injured by these exploding rifles, like Matt, would have no recourse to justice anywhere in the United States. It is not as if the alternative forums here are Ohio or New York or California; rather, there would be no alternative U.S. forum. This is fundamentally unfair and unjust.

It is clear that Matt Haymaker and the Commonwealth of Kentucky, as well as the other injured victims in this state, have a significant interest in having this dispute litigated in Kentucky. Their interest substantially outweighs any burden which may be imposed on Dikar.

B. PLAINTIFF IS ENTITLED TO DISCOVERY AS IT RELATES TO THE JURISDICTIONAL ISSUE

It is clear that Dikar's motion is in reality one for summary judgment, since it relies on the tendered affidavits of Dikar representatives as to its activities in making, selling, advertising and marketing this and other firearms. The "motion to dismiss" must therefore be decided under the principles relating to summary judgments, found in F.R.C.P. 56. One of these principles is that a party is not entitled to summary judgment until the opposing party has had a reasonable opportunity to discover the relevant facts as to the issues in question. Vance v. U.S., 90 F.3d 1145, 1148 (6th Cir. 1996) (citing Whites Landing Fisheries, Inc. v. Buchholzer, 29 F.3d 229, 231-232 (6th Cir. 1994)) held that:

> If the non-movant makes a proposed timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion.

There has been no opportunity for discovery here, since discovery must follow the initial meeting of the parties. The Court has just issued its Order for the initial meeting including the new parties Dikar and Gene Sears Supply

Company, which must be held by September 5, 1997. Plaintiff must have an opportunity for reasonable discovery from Dikar and from other parties, such as CVA, which had dealings with Dikar or which have knowledge of Dikar's activities. Such discovery has not yet been done and could not be done in the absence of Dikar as a party.

Plaintiff must have the right to discover, from both Dikar and CVA, (a) the documents, including correspondence and agreements, surrounding the sale of this rifle, (b) the discussions between the parties, (c) the activities of Dikar to market its products in the world market, including its admitted intent that this rifle be used in the United States, (d) the manner in which Dikar came to CVA's attention, (e) the nature of any exclusive rights by CVA to market Dikar's rifles in this country, and (f) Dikar's knowledge of the marketing and sales of this rifle in the U.S.

Plaintiff hereby moves for leave to conduct this additional critical discovery. This Court should grant Plaintiff's motion for additional discovery and permit the discovery to proceed before any motion for summary judgment pursuant to F.R.C.P. 56 is considered. Dikar may wish to renew its motion on jurisdictional grounds at the completion of the discovery.

III. CONCLUSION

Dikar's claim that this Court lacks jurisdiction would completely frustrate the intent of the Kentucky Long Arm Statute, and would leave Matt Haymaker without any practical resource against the maker of the exploding rifle which mangled his face and eye. Such a decision would also be a blow to the thirteen other consumers injured since September 1996, and to others injured in the future. Nothing could be more unfair than for Dikar to make this exploding rifle for sale in the U.S., to reap the profits from its sale as intended in numerous states, and to avoid the consequences when its rifles maim the consumers. In addition, Dikar wants to unfairly deprive the Plaintiff of any right to discover the facts to show that Dikar is subject to jurisdiction.

Based upon the foregoing reasons, the "motion to dismiss" filed by Dikar should be denied. Such dismissal would preclude Dikar from being amenable to suit anywhere in the United States.

In addition, the Court should grant Plaintiff's motion to conduct discovery from Dikar as it relates to the jurisdictional issue.

Respectfully submitted,

PETER PERLMAN LAW OFFICES, P.S.C.
388 SOUTH BROADWAY
LEXINGTON, KENTUCKY 40508
TELEPHONE: (606) 253-3919

/s/ Peter Perlman
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served by mailing same on this 15th day of August, 1997, to:

Charles E. Palmer, Jr., Esq.
Lynn C. Stidham, Esq.
STITES & HARBISON
Suite 2300
250 West Main St.
Lexington, KY 40507
ATTORNEYS FOR WAL-MART STORES, INC. And
CONNECTICUT VALLEY ARMS, INC.

V. Thomas Fryman, Jr., Esq.
Mark T. Hayden, Esq.
John K. Bush, Esq.
GREENEBAUM DOLL & McDONALD PLLC
1400 Vine Center Tower
333 West Vine Street
Lexington, KY 40507
ATTORNEYS FOR DIKAR, S. COOP. LTDA.

Kim M. Wilkie, Esq.
BOEHL, STOPHER & GRAVES
444 West Second St.
Lexington, KY 40507
ATTORNEY FOR GENE SEARS SUPPLY CO.

/s/ Peter Perlman
ATTORNEY FOR PLAINTIFF

Supreme Court, U.S.
FILED
JUN 30 1998
OFFICE OF THE CLERK

(3)

No. 97-1888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DIKAR, S. COOP. LTDA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY
(MATTHEW HAYMAKER, REAL PARTY IN INTEREST),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

*V. THOMAS FRYMAN, JR.
MARK T. HAYDEN
JOHN K. BUSH
THOMAS H. STEWART
GREENEBAUM DOLL & MCDONALD PLLC
1400 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507
(606) 231-8500

Attorneys for Petitioner
**Counsel of Record*

PRESS OF BYRON S. ADAMS ♦ WASHINGTON, D.C. ♦ 1-800-347-8208

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REPLY BRIEF

Defendant Dikar, S. Coop. LTDA ("Dikar") respectfully submits this reply brief in support of its petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit.

Argument

1. Plaintiff, Matthew Haymaker ("Haymaker"), opposes certiorari primarily on the ground that the question presented -- whether non-jurisdictional discovery may proceed before the district court has made a finding of personal jurisdiction over Dikar -- is moot because, according to Haymaker, the district court found that it had such jurisdiction by virtue of its orders issued on August 19, 1997, and October 8, 1997. *See* Opp. at 4-5. The record below, however, flatly belies Haymaker's contention.

In response to a similar argument advanced by Haymaker below, the Sixth Circuit did not interpret the district court's orders as constituting a finding of personal jurisdiction over Dikar. Indeed, the Sixth Circuit framed the issue presented as whether to grant a "writ of mandamus directing that discovery in this action be limited to personal jurisdiction issues until *after* the district court determines whether it can exercise personal jurisdiction over the petitioner." Pet. App. 1a (emphasis added). The court below did not question at any point the factual premise for this issue, which is that the district court has not yet made any finding of personal jurisdiction over Dikar.

Furthermore, the district court's orders themselves do not contain any statement that the exercise of personal jurisdiction over Dikar is appropriate. Instead, the district court deferred ruling on the jurisdictional issue until after discovery is completed. The August 19, 1997, order states that, although the motion to dismiss was denied, Dikar would be allowed to "renew *any* dispositive motion concerning jurisdictional issues" at the conclusion of "all discovery", Pet. App. 6a (emphasis added), thus making clear that the court would not address the jurisdictional issue until the conclusion of discovery. The district court's deferral of its decision was consistent with Haymaker's earlier request for discovery before the district court ruled on the jurisdictional issue. *See* Pet. at 5.[1]

Moreover, a recent decision by the same district judge who presides over the present case, Judge Karl S. Forester, confirms that the district court did not find that it had personal jurisdiction over Dikar. In *Howard v. Connecticut Valley Arms, Inc.*, No. 97-414 (E.D. Ky. June 22, 1998) (reprinted as Appendix A hereto), Dikar moved to dismiss on the same jurisdictional grounds raised in the present case. Judge Forester then ordered:

> For the reasons cited in *Haymaker v. Connecticut Valley Arms, et al.*, Civil Case No. 97-28 (E.D. Ky.),

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[1]Moreover, as Dikar has explained, the district court could not have intended to issue a substantive ruling on personal jurisdiction because briefing of that issue was not completed when the district court issued its August 19, 1997, order. *See* Pet. at 7 n.1. Also, as a matter of logic, the district court's order could not have been a ruling that it has personal jurisdiction over Dikar. It would have made no sense for the district court to grant Haymaker leave to conduct discovery of jurisdictional facts if the court had already determined the jurisdictional issue in Haymaker's favor.

> the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS THAT:
>
> (1) defendant's motion to dismiss for lack of jurisdiction [docket entry 8] IS PASSED PENDING THE CONCLUSION OF DISCOVERY;
>
> . . . .

Reply App. 1a-2a.

Thus, Judge Forester himself rejects Haymaker's claim that the district court ruled on the substantive merits of Dikar's jurisdictional defense. Instead, Judge Forester views his orders in the present case as only establishing that his ruling on personal jurisdiction is deferred, or "passed", until all discovery is completed. The question presented regarding the proper scope of discovery prior to the district court's ruling on personal jurisdiction, therefore, is properly before this Court.

2. Although Haymaker asserts that "the plaintiff need only make a *prima facie* showing of personal jurisdiction," Opp. at 5, there is no finding in the district court's orders that a *prima facie* showing has been made here. By contrast, in an opinion recently issued by Judge Joseph M. Hood of the United States District Court for the Eastern District of Kentucky (the same district in which the present case is pending before Judge Forester), the court ***did*** explicitly address whether a *prima facie* showing of personal jurisdiction over Dikar had been made. Based upon a jurisdictional record identical in all material respects to the present case, Judge Hood held that the *Bowman* plaintiffs had ***failed*** to make a *prima facie* showing of jurisdiction over Dikar. *See Bowman v. Cumberland Valley Arms*, Civ. No.

97-296 (E.D. Ky. June 10, 1998) (reprinted as Appendix B, hereto), *motion for reconsideration pending*.[2]

The *Bowman* plaintiffs, like Haymaker, brought a products liability action against Dikar, claiming injuries from an accident involving use of a rifle allegedly manufactured by Dikar. As in the present case, Dikar moved to dismiss the complaint in *Bowman* on the basis of lack of personal jurisdiction.

The *Bowman* court held, *inter alia*, that the plaintiffs had "failed to set forth a prima facie case on personal jurisdiction over Dikar. . ." Reply App. 4a. Citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), Judge Hood noted that "[t]he Supreme Court . . . effectively established that a defendant's act of placing a product into the stream of commerce was no longer sufficient" to establish personal jurisdiction. Reply App. 6a. The court thus squarely rejected the stream-of-commerce theory advanced by Haymaker in the present case. Relying on an affidavit of Jon Muniategui, Dikar's General Director, the *Bowman* court concluded: "[T]he Court cannot say that Dikar has had sufficient contact with Kentucky to satisfy the due process clause of the U.S. Constitution." Reply App. 7a.

Although the *Bowman* court allowed limited discovery to proceed notwithstanding the plaintiffs' failure to make a *prima facie* showing, the order nevertheless makes clear that such discovery would be limited to *jurisdictional* facts only. Thus, the conflict in the lower courts regarding the scope of

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[2]The lead defendant in *Bowman*, Connecticut Valley Arms, Inc., is erroneously listed in the case caption of the order as "Cumberland Valley Arms."

discovery when jurisdiction is in dispute (*see* Pet. at 15-19) now exists between federal judges in the very district where the present case arises.

3. Haymaker also argues that certiorari should be denied because, according to Haymaker, the district court's decision is a purely discretionary, essentially non-reviewable ruling. As this Court has recently reiterated, however, discretionary decision making of a district court is not immune from appellate review when the district court's ruling is based on an error of law. *See, e.g., Koon v. United States*, 116 S. Ct. 2035, 2047 (1996) (noting that a district court lacks "discretion" to disregard the law).

Simply put, a district court does not have discretion to issue orders that violate the Due Process Clause by subjecting a party to non-jurisdictional discovery prior to a finding of personal jurisdiction over that party. Where a constitutional violation would result if a order is allowed to stand, this Court has granted certiorari after an appellate court refused to grant a writ of mandamus or prohibition. *See, e.g., Asahi*, 480 U.S. 102; *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286 (1980).

4. Finally, Haymaker's claim of undue burden and wasted judicial resources arising from limiting discovery to jurisdictional issues rings hollow for at least two reasons. First, as the *Bowman* decision suggests, the jurisdictional facts will likely be insufficient to establish that Kentucky has personal jurisdiction over Dikar -- in which case, the resources of the parties and the judiciary would be best preserved if discovery of non-jurisdictional facts, irrelevant to disposition of the case, does not take place.

Second, to the extent that the burdens on the parties influence due process analysis in personal jurisdiction cases, the focus is not on the in-state plaintiff's interests, but rather on the out-of-state defendant's burden of litigating in the forum state, particularly where, as here, the defendant is an entity of a foreign country. *See, e.g., Asahi*, 480 U.S. at 114 ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."); *American Dredging Co. v. Miller*, 510 U.S. 443, 460 (1994) ("[T]he Due Process Clause provides an important measure of protection for out-of-state defendants, especially foreigners.") (Stevens, J., concurring in part and concurring in the judgment) (citing *Asahi* and *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984)). Thus, rather than weigh against certioriari, the burdens on the parties relevant here as well as conservation of judicial resources militate in favor of this Court's review.

Conclusion

There is no basis in the record for Haymaker's assertion that the district court in the present case made a finding of jurisdiction over Dikar. In fact, the record reveals that Judge Forester has not made any jurisdictional ruling, but instead has delayed ruling on the issue until all discovery is completed in this case. Indeed, in *Howard*, Judge Forester confirmed that he has not made any finding of personal jurisdiction over Dikar in the present case. By allowing discovery of non-jurisdictional facts to proceed in this case prior to any finding of personal jurisdiction, the district court has violated Dikar's due process rights and therefore is not entitled to any deference by this Court.

Judge Forester's decision now is in conflict not only with the opinions of several appellate courts noted in the petition for certiorari, but also with a decision squarely on point recently issued by Judge Hood, who is Judge Forester's colleague on the same district court. Accordingly, for the foregoing reasons and those set forth in the petition for certiorari, the Court should grant certiorari and set the case for plenary review to resolve this conflict.

Respectfully submitted,

*V. Thomas Fryman, Jr.
Mark T. Hayden
John K. Bush
Thomas H. Stewart
GREENEBAUM DOLL &
McDONALD PLLC
1400 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507
(606) 231-8500

COUNSEL FOR DEFENDANT
DIKAR, S. COOP. LTDA.

**Counsel of Record*

APPENDIX

Howard v. Connecticut Valley Arms, Civ. No. 97-414 (E.D. Ky. June 22, 1998) . . . . . Appendix A

Bowman v. Connecticut Valley Arms, Civ. No. 97-296 (E.D. Ky. June 10, 1998). . . . . Appendix B

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-414

SHERMAN HOWARD, PLAINTIFF,

V.

CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC., and
DIKAR, S. COOP. LTDA. DEFENDANTS.

ORDER

[Filed June 22, 1998]

This matter is before the Court on two motions, to wit, (1) the motion of Dikar, S. Coop. Ltda. ("Dikar") to dismiss plaintiff's complaint as against Dikar pursuant to Fed.R.Civ.P. 12(b)(2), (5), on the grounds that the Court lacks personal jurisdiction over Dikar and that service of process was insufficient, and (2) the motion of the plaintiff, Sherman Howard ("Howard"), for leave to re-serve Dikar in accordance with the Hague Service Convention.

For the reasons cited in *Haymaker v. Connecticut Valley Arms, et al.*, Civil Case No. 97-28 (E.D.Ky.), the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS THAT:

(1) defendant's motion to dismiss for lack of jurisdiction [docket entry 8] IS PASSED PENDING THE CONCLUSION OF DISCOVERY;

(2) defendant's motion to dismiss for improper service [docket entry 8] IS DENIED; and

(3) plaintiff's motion to re-serve Dikar [docket entry 10] IS GRANTED.

This 22nd day of June, 1998.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 97-296

FYRELON BOWMAN, ET AL., PLAINTIFFS,

v.

CUMBERLAND VALLEY ARMS, ET AL.,
DEFENDANTS.

MEMORANDUM OPINION & ORDER

[Entered June 10, 1998]

This matter is before the Court in the motion of the defendant, Dikar, S. Coop. LTDA. ("Dikar"), to dismiss for lack of personal jurisdiction over it. In support, Dikar submits that it does not have sufficient minimum contacts with the State of Kentucky for this Court to exercise personal jurisdiction over it. Also, the plaintiffs have failed to properly serve it under Fed. R. Civ. P. 4(f)(2).

The plaintiffs have responded, arguing that they have made out a prima facie case for personal jurisdiction and that further discovery is needed. The plaintiffs, however, have failed to respond to Dikar's contention that it was not properly served.

Being fully briefed, this matter is now ripe for decision. Having reviewed the record and the memoranda submitted by

the parties, the Court finds that the plaintiffs have failed to set forth a prima facie case on personal jurisdiction over Dikar and have failed to properly serve Dikar. However, because the Court is compelled to grant the plaintiffs additional time to properly serve Dikar and to conduct discovery on the issue of personal jurisdiction, the Court declines to grant Dikar's motion to dismiss at this time. Consistent with that determination, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The plaintiff, Fyrelon Bowman, purchased a Connecticut Valley Arms ("CVA") .50-caliber inline muzzle-loading rifle from the Wal-Mart Store in Whitesburg, Kentucky. While shooting the rifle, the rifle exploded, causing him severe injuries to his face and right eye. He has brought this suit, seeking damages for the injuries he sustained as a result of the explosion. His wife has joined in the suit, seeking damages for loss of consortium as a result of the incident.

The defendant, Dikar, has now moved the Court to dismiss the action against it on the basis that the Court lacks personal jurisdiction over it and that it has not been properly served. First, Dikar submits that it has "insufficient contact with Kentucky to support the exercise of jurisdiction consistent with the Kentucky long-arm statute and the Due Process Clause." Second, Dikar relays that the plaintiffs did not serve process on it "in accordance with the Hague Service Convention, as required by Fed. R. Civ. P. 4(f)(2)."

The plaintiffs respond that Dikar's motion should be denied because they have shown sufficient contacts by Dikar with Kentucky for Kentucky to assert personal jurisdiction over Dikar. Moreover, they assert that the motion is

premature because they have not had an opportunity to conduct discovery on this matter.

The defendants reply that the plaintiffs' arguments fail. First, they highlight the fact that the plaintiffs failed to even address the issue of ineffective service of process on it. Second, Dikar submits that discovery is not necessary where the plaintiff has failed to even put forth a prima facie showing of minimum contact sufficient to support personal jurisdiction. Last, Dikar maintains that it does not have sufficient contacts with Kentucky to support this Court exercising personal jurisdiction over it.

CONCLUSIONS OF LAW

I. The Plaintiffs have Failed to Make a Prima Facie Showing of Minimum Contacts Sufficient to Support the Court Exercising Personal Jurisdiction Over Dikar

In order for a State to exercise personal jurisdiction over a defendant, the defendant must have some minimum contact with that State for due process to be satisfied. The Supreme Court has clearly stated,

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

In deciding whether a defendant has sufficient contact with the forum state to past constitutional muster, the Court must determine whether the defendant has purposefully availed itself of the benefits and privileges of conducting business within the forum state. *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 108-09 (1987).

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State.'" Most recently we have reaffirmed the oft-quoted reasoning of *Hanson v. Denkla*, that minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State."

Id. (internal citations omitted). The Supreme Court, thus, effectively established that a defendant's act of placing a product into the stream of commerce was no longer sufficient; instead, "minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Id.* at 112; *see also Halderman v. Sanderson Forklifts Co., Ltd.*, 818 S.W.2d 270, 274 (Ky. Ct. App.

1991) (noting that a plurality of the Supreme Court had rejected the "stream of commerce" doctrine in *Asahi*).

Based on the defendant's affidavit, which has not been countered by the plaintiff, Dikar is a small business owned and operated in Spain, which has never sold, promoted or marketed any product or service in the United States. Although it does manufacture the rifle involved in this case, the rifle was made solely at the request of CVA, and CVA had the sole discretion to distribute the rifle. Dikar had no involvement in any subsequent sale of the rifle and did not discuss, correspond or communicate with CVA what region of the United States the rifle would be sold. Particularly, Dikar had no idea that the rifle would be or was sold in Kentucky. Based on the above facts, then, the Court cannot say that Dikar has had sufficient contact with Kentucky to satisfy the due process clause of the U.S. Constitution. *Asahi*, 480 U.S. at 112-13.

II. Because No Discovery Has Been Taken, The Court Will Not Dismiss This Matter for Lack of Jurisdiction At This Time

Because, however, no discovery has been taken in this matter, and because the plaintiffs specifically request that discovery on Dikar's contacts with Kentucky be allowed, the Court will not grant Dikar's motion at this time. Although Dikar argues that discovery need not be taken when a plaintiff has failed to set forth a prima facie showing of personal jurisdiction, *see Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 154 (6th Cir. 1997); *Market/Media Research, Inc. v. Union-Tribune Publ'g Co.*, 951 F.2d 102, 106 (6th Cir. 1991), cer. denied, 506 U.S. 824 (1992), the Sixth Circuit gives the district court discretion to allow limited discovery when personal

jurisdiction is in question. *Theunissen v. Matthews*, 935 F.2d 1454, 1465 (6th Cir. 1991). In fact, the First Circuit has even implied that it would be an abuse of discretion not to allow limited discovery where the plaintiff has asked for such discovery. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 681 (1st Cir. 1992).[1]

III. Discovery Cannot Be Taken As Dikar Has Not Been Properly Served

Whether discovery should be allowed, however, is a moot point at this time since the plaintiffs have not sufficiently served Dikar. Under Fed. R. Civ. P. 4(f)(2), Dikar was to be served pursuant to the Hague Convention treaty. The Hague Convention treaty does not allow for service of process by certified mail. *See Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989). Instead, process is to be served through the appropriate Central Authority, the Secretaria General Tecnica for Spain. *See* Fed. R. Civ. P. 4, Convention On The Service Abroad of Judicial And Extrajudicial Documents In Civil Or Commercial Matters, Chapt. I, Article 2; *see also Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1389 (8th Cir. 1995).

Since the plaintiffs have failed to properly serve Dikar, the Court must either dismiss this matter without prejudice or give the plaintiffs additional time to properly serve Dikar.

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[1]It should be noted that the cases Dikar relies on, *Kerry Steel, Inc.* and *Market/Media Research, Inc.*, mainly dealt with whether the district court should grant an evidentiary hearing. Moreover, the *Kerry Steel, Inc.* court highlighted the fact that the plaintiff had "neither moved for an evidentiary hearing nor requested that the court delay its ruling to allow additional discovery." 106 F.3d at 154.

Although the Court finds the plaintiffs' lack of a response on this matter to not warrant extending the time for service, the courts which have addressed this very situation have merely quashed service and allowed the plaintiff an extension of time to effect service. *See Bankston*, 889 F.2d at 174; *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 576 (4th Cir. 1983); *Wilson v. Honda Motor Co., Ltd.*, 776 F. Supp. 339, 342 (E.D. Tenn. 1991); *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 401 (N.D. Ohio 1990). Thus, the Court feels compelled to provide an additional amount of time for service.

If, however, Dikar is not properly served within that time, Dikar need only make a renewed motion to dismiss and such motion will be granted. If Dikar is properly served within that time frame, the Court will allow the plaintiffs to take limited discovery on the issue of personal jurisdiction. After such discovery is taken, the Court will entertain whether the plaintiffs have proved sufficient minimum contacts. Accordingly,

IT IS ORDERED that the motion to dismiss by the defendant, Dikar, [Record No. 8] be, and the same hereby is, **DENIED WITHOUT PREJUDICE**; Dikar may renew its motion, if necessary, after the additional time for service of process or for limited discovery has elapsed. **IT IS FURTHER ORDERED** that service of process upon the defendant, Dikar, [Record No. 7] be, and the same hereby is, **QUASHED**; the plaintiffs **SHALL** have until July 10, 1998, to effect service on Dikar. If, within the time-frame, proper service is effected, the plaintiffs **SHALL** have until August 10, 1998, to conduct discovery on whether Dikar has sufficient contact with Kentucky for the Court to entertain personal jurisdiction.

This the 9th day of June, 1998

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: June 10, 1998